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REPORTS

OF

CASES

ARGUED AND DETERMINED

IN THE

HIGH COURT OF CHANCERY

DURING THE TIME OF

Lord Chancellor Eldon.

By GEORGE TURNER, and JAMES RUSSELL, Esqs.

BARRISTERS AT LAW.

VOL. I.

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Earl of ELDON, *Lord Chancellor.*

Sir THOMAS PLUMER, *Master of the Rolls.*

Sir JOHN LEACH, *Vice-Chancellor.*

Sir ROBERT GIFFORD,
Sir J. S. COPLEY, } *Attorneys-General.*

Sir J. S. COPLEY,
Sir CHARLES WETHERELL, } *Solicitors-General.*

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REPORTS

OF

CASES

ARGUED AND DETERMINED

IN THE

HIGH COURT OF CHANCERY.

COMMENCING IN THE

SITTINGS BEFORE MICHAELMAS TERM,

3 Geo. IV. 1822.

1822.

May 11.
Nov. 2—12—14.

TWEDDELL *v.* TWEDDELL.

A father, tenant for life, remainder to his first and other sons successively in tail male; The eldest son, soon after he attained twenty one, joined his father in suffering a recovery, an annuity was secured to him during his father's life, and parts of the estates were limited to the father in fee, the residue of them were resettled, the son taking back an estate for life, with remainder to his first and other sons in tail general, remainder to his daughters in tail general. The transaction to be considered as a mixed case of bargain and sale, and of family arrangement; and the eldest son having died without issue, a bill filed by his brother, the next remainderman in tail, who had done confirmatory acts, and accepted interests under the will of his father, to set aside the settlement as obtained by undue influence, was dismissed.

Transactions of this nature between father and child, to be viewed with a reasonable degree of jealousy, not in the light of reversionary bargains.

Whether, after the lapse of twenty years, such a suit could be maintained at all.—*Quære.*

Whether a remote remainderman can complain of a transaction between the tenant for life and the immediate remainderman, where the immediate remainderman makes no complaint.—*Quære.*

JOHN AYNSLEY, being seized in fee of freehold estates in the counties of *Northumberland* and *Dur-*

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ham, by his will dated the 15th of *January*, 1748, devised the same, together with certain copyhold hereditaments, which he had duly surrendered to the uses of his will, To the use of *Francis Tweddell* for life, with a limitation to trustees during his life to preserve contingent remainders, with remainder to the first and other sons of the said *Francis Tweddell* successively in tail male, with remainders over.

Upon the death of the testator, in 1752, *Francis Tweddell* entered into the possession of the devised estates. He had issue three sons; *John Tweddell*, his eldest son, *Francis Tweddell* the plaintiff, his second son, and *Robert Tweddell* one of the defendants, his youngest son. He had also issue two daughters.

In the years 1776 and 1784 two acts of parliament were passed for inclosing the common fields in certain parishes, in which some of the devised estates were situate; and allotments were made to *Francis Tweddell* the father, in respect of those estates. His proportion of the expenses of passing and carrying these acts into execution amounted to the sums of 518*l.* 10*s.*, and 180*l.*, and those sums were paid by him.

By an indenture, dated the first of *January*, 1783, *Francis Tweddell* the father, by virtue of a power contained in the first mentioned act, demised the lands allotted to him under that act to *Robert Ilderton*, for the term of one thousand years, by way of mortgage for securing the sum of 369*l.*, being that part of the sum of 518*l.* 10*s.* which he was enabled to charge upon the allotments; and, by an indenture bearing even date with the mortgage, *Ilderton* declared that his name was made use of as a trustee for *Francis Tweddell* the father.

In the month of *June*, 1791, *John Tweddell* attained the

age of 21 years; and in the latter end of the year 1792, he agreed to join with his father in suffering recoveries of all the devised estates, and in limiting them to the uses after mentioned. Indentures of lease and release, dated the 4th and 5th of *January*, 1793, were accordingly prepared and executed; the release recited the facts before stated, that application was intended to be made to parliament, for an act to effect the inclosure of other commons, and that *Francis Tweddell* the father, had expended divers sums of money, to a very considerable amount, and more than a tenant for life could reasonably have been expected to do, in erecting hedges and fences upon, and in making other lasting improvements of the devised estates; and then, in performance of the said agreement, and in consideration of the said sum of 369*l.*, (part of the aforesaid sum of 518*l.* 10*s.*,) then due to the said *Francis Tweddell* the father, by virtue of the said mortgage to the said *Robert Ilderton*, and of the sum of 149*l.* 10*s.*, being the residue of the said sum of 518*l.* 10*s.*, and of the said sum of 180*l.*, and of the several other sums of money expended by the said *Francis Tweddell* the father, as thereinbefore recited; and also, in consideration of the covenants thereafter contained, on the part of the said *Francis Tweddell* the father, and of a bond entered into by him, for the payment to the said *John Tweddell*, during the life of him the said *Francis Tweddell*, of an annuity of 180*l.*, and of a further annuity of 20*l.*, in the event in the said bond expressed; they the said *Francis* and *John Tweddell* conveyed, all the aforesaid freehold estates in the said county of *Northumberland*, to a tenant to the precipe for suffering a recovery; which recovery, it was declared, should enure, as to the principal part of the same estates, to the use of the said *Francis Tweddell* the father for life, without impeachment of waste, remainder (subject to an annuity of 100*l.*, thereby limited to *Jane*, the wife of the said *Francis Tweddell* the father, during her widowhood, in case she should survive her husband,) to the use of the said *John Tweddell*

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for life, without impeachment of waste, remainder to the use of his first and other sons successively in tail general, remainder to the use of his daughters, as tenants in common in tail general, with cross-remainders between them in tail, remainder, as to one moiety of the said premises to such uses generally as the said *Francis Tweddell* the father, should by deed or will appoint; and in default of such appointment, to the uses therein mentioned; and as to the other moiety of the said premises, to the use of the defendant *Robert Tweddell* for life, without impeachment of waste, remainder to the use of his first and other sons successively in tail general, remainder to the use of his daughters, as tenants in common in tail general, with cross-remainders between them in tail, remainder after and subject to a general power of appointment, limited to *Francis Tweddell* the father, to the use of the plaintiff *Francis Tweddell* for life, without impeachment of waste, with the like limitations in favour of his sons and daughters in tail, with the ultimate remainder to the use of the said *Francis Tweddell* the father, in fee; and as to all other the estates in the said county of *Northumberland*, to the use of *Francis Tweddell* the father, in fee. By the indenture of release *John Tweddell* was impowered, when he should be in actual possession of the premises limited to him for life, to charge the same with an annuity, not exceeding 200*l.*, by way of jointure, for the life of any woman he might marry; and with any sum, not exceeding 2000*l.*, for the portions of daughters and younger sons; and *Francis Tweddell* the father, covenanted to complete, at his own expense, the inclosure then in progress under the second mentioned act of parliament, and to defray the expenses of obtaining and carrying into execution the act of inclosure then intended to be applied for, provided such expenses should not exceed the amount which a tenant for life should be empowered under the act to charge upon the lands allotted to him; The term of 1000 years, granted to *Ilderton*, was surrendered and merged.

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In Easter Term, 1793, a recovery was suffered of the *Northumberland* estates; and deeds having been executed by *Francis Tweddell* the father, and *John Tweddell*, for the purpose of making a tenant to the precipe of the Durham estate, recoveries were suffered thereof, and of the copyhold premises, and they were respectively limited to the use of *Francis Tweddell* the father, in fee. On the 25th of *July*, 1799, *John Tweddell* died without issue; and in the year 1800, *Francis Tweddell* the plaintiff, joined with his father in suffering a recovery of a portion of the *Northumberland* estate, which had been intended to be comprized in the recovery of 1793, but which had been omitted by mistake, and in limiting the same to his father in fee.

Francis Tweddell the father, having sold the freehold estate at *Durham*, and part of the other freehold and copyhold estates limited to him in fee, by his will dated the 14th of *March*, 1805, exercised the power first reserved to him by the release of *January*, 1793, and limited the moiety subject to the power, of parts of the estates, to trustees for a term for securing certain annuities, remainder to the defendant *Robert Tweddell* for life, remainder to his first and other sons successively in tail general, remainder to his daughters, as tenants in common in tail general, remainder to the plaintiff *Francis Tweddell* for life, remainder to his first and other sons successively in tail general, remainder to his daughters as tenants in common in tail general, with remainder to his own right heirs; and he limited the moiety of the residue of the said estates, to trustees for a term for securing annuities, remainder to the plaintiff *Francis Tweddell* for life, remainder to his first and other sons successively in tail general, remainder to his daughters as tenants in common in tail general, remainder to the defendant *Robert Tweddell*, and his issue, with remainder to his own right heirs. The testator then devised certain parts of the estates limited to him in fee by the release of *January* 1793, in moieties between his two sons, the

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plaintiff and defendant, and their issue; and the residue of such estates he devised to trustees, upon trust to sell, and to stand possessed of the money produced by the sale upon trusts for the benefit of his daughters. The testator appointed the defendant *Robert Tweddell* and *Simon Mewburn*, executors of his will; and died on the 14th of *October*, 1805.

The Bill was filed on the 13th of *February*, 1813, by *Francis Tweddell* the son, against *Robert Tweddell*, and the executors and trustees under the will of *Francis Tweddell* the father, and was amended by virtue of an order dated the 5th of *May*, 1815. The amended bill, in addition to the facts beforementioned, alleged, that undue advantage had been taken of the youth and dependent situation of *John Tweddell*; that the benefits obtained by *Francis Tweddell* the father were unreasonable and unjust, and represented the plaintiff's embarrassments as the reason of his having joined in the recovery suffered by him after the death of his elder brother. It then prayed that the recovery deeds and the recoveries beforementioned might be declared to have been obtained by undue influence, and that the limitations, contained in the release of *January*, 1793, which were then undetermined, might be set aside, and the plaintiff be declared entitled in equity to the fee simple and inheritance of such of the estates devised by the will of the said *John Aynsley*, as were then remaining unsold, and that the defendant *Robert Tweddell*, and the other defendants the trustees, might be decreed to convey the respective estates and interests, vested in them by the recovery deeds, and by the will of *Francis Tweddell* the father, to the plaintiff in fee; that an account might be taken of the sums of money produced by the sale of the estates, limited to *Francis Tweddell* the father in fee, and which had been sold by him and his devisees in trust; and that the executors of *Francis Tweddell* the father, might be decreed to pay to the plaintiff, what, upon taking such

account, should be found to have arisen from the aforesaid sales, (except the produce of the sale of the estates, devised by the will of *Francis Tweddell* the father in trust for sale, the bequest of which in favour of his sisters the plaintiff offered to confirm,) and in case the executors should not admit assets sufficient to answer what might be found due to the plaintiff, that the usual accounts might be taken of the personal estate of the said *Francis Tweddell* the father.

The defendant *Robert Tweddell* by his answer admitted, that at the time when the recovery was proposed to be suffered, *John Tweddell* had no other means of subsistence, beyond what was allowed him by his father, except a fellowship at Trinity College, in the University of Cambridge, which did not then produce so much as 80*l.* a year, and that the recovery deeds were prepared by the directions of *Francis Tweddell* the father, and that the same solicitor was employed in the transaction on behalf both of *John Tweddell*, and of *Francis Tweddell* the father. The defendant also admitted that part of the freehold and copyhold premises, limited to *Francis Tweddell* the father, in fee, not including the freehold estate at *Durham*, were sold by him for the sum of 4233*l.*, and that other parts of the aforesaid premises were sold by his devisees in trust for 1350*l.*, and that the remainder of the aforesaid premises were of the value of 700*l.*, or thereabouts. The defendant also stated that the moiety of the premises, which, upon the death of *John Tweddell* without issue, became subject to the power of appointment of *Francis Tweddell* the father, did not exceed in value 15,000*l.* The defendant denied that any undue advantage had been taken of *John Tweddell*, or that the terms entered into were unreasonable, or that *John Tweddell* was ignorant of the value of the property proposed to be limited to *Francis Tweddell* the father, and stated that *John Tweddell* lived upwards of six years after suffering the recovery, and never expressed himself dissatisfied therewith, or with the settlement made thereupon, and that the plain-

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tiff had himself acquiesced in the settlement until the beginning of the year 1813. The defendant admitted the plaintiff's embarrassments, but submitted that by suffering the recovery of the premises omitted by mistake in the deeds of 1793, he had confirmed the recovery suffered by his brother. The answer then set forth a clause in the will of the testator *Francis Tweddell*, by which, after reciting that his son *Francis Tweddell* the plaintiff, was indebted to him on bond note and otherwise, the said testator released and discharged his said son from the payment of all such sum and sums of money, and directed that all the securities given by him for the money due should immediately after his decease be delivered up to be cancelled.

James Losh, who was stated in the answer to have been consulted by *John Tweddell*, on the subject of the fairness of the recovery, deposed, that he did not believe that *John Tweddell* had executed the deeds in question without consideration or reflection, inasmuch as he had previously mentioned to the deponent his determination to propose an arrangement for the settlement of the family property, and his wish to have some permanent allowance out of the same; that *John Tweddell* was at the time of the transactions aforesaid, as the deponent had reason to believe, well acquainted with the nature and value of the property proposed to be barred and settled; and that after he had executed the deeds, and perfected the arrangement, he had frequently expressed himself to the deponent to be perfectly satisfied therewith, and perfectly to approve thereof.

The solicitor, who was concerned in the transaction for both parties, deposed; that he had at different times before the recovery was suffered, and the deeds were executed, conversed with *John Tweddell* upon the arrangement made by him with his father; and that upon such occasions he appeared to be satisfied therewith, and perfectly to understand the same; and particularly, that he had expressed

himself glad to have it in his power, by executing the deeds, and joining in suffering the recovery, to reimburse his father for the advances which he had made in order to improve the estates, and to enable him to provide for his the said *John Tweddell's* brothers and sisters.

On the cross-examination of these witnesses by the plaintiff it appeared, that they were unacquainted with the property comprized in the deeds and recoveries, and incompetent to form any opinion of the value of the interests purchased by *Francis* and *John Tweddell* of each other, and had not taken upon themselves to explain to *John Tweddell*, or advise him upon the value of such interests. The solicitor also deposed to his belief, that no other person was employed on the behalf of *John Tweddell*, to explain or advise him upon the fairness of the bargain. Evidence was also entered into by the plaintiff, to shew that *John Tweddell* was indebted at the date of the transaction.

The cause having been heard before the Vice-Chancellor, on the 10th of *July*, 1818, his Honour ordered the bill to be dismissed.

The plaintiff appealed from the decree of the Vice-Chancellor, and the cause now came on to be argued.

Mr. *Hart*, Mr. *Heald*, and Mr. *Treslove*, for the plaintiff.

It is the established principle of the court, that in dealings between attorney and client, guardian and ward, and in the cases of reversionary interests, the purchaser is bound to shew that he has given the full consideration, *Gibson* v. *Jeyes* (*a*), *Gowland* v. *De Faria* (*b*), and in transactions of this nature between father and child, the natural influence of the father has always induced the court to in-

(*a*) 6 Ves. 266. (*b*) 17 Ib. 20.

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terfere and examine the consideration on which the bargain is founded. Every thing is not in such cases to be presumed in favour of the affection between father and child; *Gould* v. *Okeden* (*c*), *Morgan* v. *Morgan* (*d*), *Heron* v. *Heron* (*e*), *Kinchant* v. *Kinchant* (*f*). The plaintiff is either entitled to the estate in fee simple, as the heir at law of *John Tweddell*, or to call upon the court to convey to him in tail, on the ground that the settlement has been disturbed. The cases of *Colby* v. *Smith* (*g*) and *Englefield* v. *Englefield* (*h*) shew, that although the plaintiff claims as remainder man, the court can afford him relief. There are, besides, many cases in which the court has recognized the interests of a remote remainder, with reference to the proceedings of the owners of the particular estate. *Robinson* v. *Lytton* (*i*), Lord *Dursley* v. *Fitzhardinge* (*k*). The pressure under which the plaintiff laboured, when he joined in the recovery of 1800, will prevent it from operating as a confirmation, *Crowe* v. *Ballard* (*l*), *Wood* v. *Downes* (*m*).

Mr. *Horne* and Mr. *Duckworth* for the defendant.

The settlement of 1793 has a reference to pecuniary matters only in the usual mode of family arrangements, and is not to be viewed in the light of a bargain and sale. Under the original settlement of the estates, no provision could be made for daughters, or younger children; the son therefore might naturally wish to enable the father to raise money for these purposes, and in *Kinchant* v. *Kinchant*, the advantage derived to brothers and sisters from the transaction was considered as a material circumstance; in this

(*c*) 4 B. P. C. Ed. Toml. 198.
(*d*) 1 Atk. 489.
(*e*) 2 Atk. 160.
(*f*) 1 B. C. C. 369.
(*g*) 1 Vernon, 205.
(*h*) 1 Vern. 443.
(*i*) 3 Atk. 209.
(*k*) 6 Ves. 251.
(*l*) 1 Ves. Jun. 215. 3 B. C. C. 117. 2 Cox. Chan. Cas. 253.
(*m*) 18 Ves. 120.

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case there is no evidence of undue influence, and, on the ground of inadequacy of consideration alone, the court will not interfere, unless it is so gross as to raise a presumption of fraud. Any complaint of such a transaction as this must be made at the earliest period, *Brown* v. *Carter* (*n*): but the plaintiff's interest as tenant in tail in remainder commenced in 1799: he has confirmed the transaction by suffering the recovery in 1800, and has acquiesced in and taken interests under the will of his father, inconsistent with the validity of the settlement. In consequence of that acquiescence, his father's executors have not pressed him for the payment of debts, from the recovery of which they are now barred by the statute of limitations.

Mr. *Hart* in reply.

Where the court sustains a bargain on the ground that it is a family transaction, it must see clearly that the parties acted upon that principle. But the deed shews, that in this case family advantages did not enter into the consideration of the parties. Lapse of time is only regarded by the court where the parties have dealt with their interests, so that the plaintiff cannot restore them to the same situation, or where evidence may be considered to be lost, objections which do not apply in the present instance. In *Newman* v. *Rogers* the late Master of the Rolls overturned a transaction similar to the present on the simple ground of inadequacy of value, although there had been a long acquiescence.

The LORD CHANCELLOR.

When this case was first opened, it appeared to me that there were some very important points in it, the first of which was, whether, the complaint not having been made within twenty years, on the principle of a late decision in

(*n*) 5 Ves. 877.

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the House of Lords the cause could be heard at all. I should have thought that a very material and important point, both for argument and for the decision of the court, if the case had admitted of it, but without deciding that after twenty years, *Francis Tweddell* the plaintiff could not have sued, it is sufficient for me to say, that the bill must be taken to have been filed in *February* 1813, and therefore within the twenty years, and that consequently the point in question does not arise.

Another equally material and important question is, whether the plaintiff can come into court at all or not, under the circumstances of the case. The Lord Chancellor here stated the case; and observed, that under the original settlement, the father being only tenant for life, could make no provision for any of his children; and that *John*, being only tenant in tail male, could in his father's lifetime make no provision for daughters, if he should have any; but that *John* and his father might unquestionably, without any consideration, have barred both the brothers; and that the effect of the recovery which had been suffered was, to introduce *Robert* as a remainder man into the succession, before *Francis* could become entitled. He then proceeded.

The first question therefore to be considered is, what *Francis* could have done in the lifetime of *John*; and I wish to be informed whether there is any case, in which a remote remainder man has come into court, complaining of what he is pleased to call a deception on the immediate remainder man, where that immediate remainder man himself made no complaint. I recollect no such instance. If *Francis* had made the complaint in the lifetime of *John*, *John* might have replied, I choose to prefer *Robert* to you, and to acquire such an estate as will enable me to provide for daughters. It seems therefore to me to be infinitely difficult to suppose, that a remote remainder man could complain to the court of a transaction, of which the party him-

self, the remainder man immediately interested, did not complain; and the new limitations are of such a nature, that *John Tweddell*, the immediate remainder man, must have known, that by that transaction he was altering the succession and order of the estate, both as to his brothers, and as it might affect his daughters, if he should have any. The point however being new, and no decision having yet been made on it, I shall not pronounce judgment to that effect; and I wish it to be understood, that I do not decide, that after twenty years this gentleman could not complain at all, or that he could not come to complain of this transaction, although it was not complained of by the immediate remainder man.

The Court will not view transactions between father and son in the light of reversionary bargains, but will regard them, as family arrangements, with a reasonable degree of jealousy; and will not look into all the motives and feelings which might actuate the parties in entering into such arrangements. There may be considerations in such cases, which the court could not possibly reach. It might be conducive for instance to the best interests of the parties, that the father should be enabled to educate all his children in a liberal way; a principle on which the court acts in the case of an infant eldest son, by giving for his maintenance a much greater sum than he can possibly require, in order that his brothers and sisters may be so brought up and educated, and placed in such situations, as to do him credit in the world.

Principle upon which the court allows a liberal maintenance to an infant eldest son.

John Tweddell died in 1799; and taking it that upon his death a title did arise to the plaintiff, so far from prosecuting that title, he does confirmatory acts with respect to the new settlement, and such confirmatory acts as to shew that he must have understood what the new settlement was. In 1805, the father of the plaintiff dies, having made his will with reference to this settlement: by that

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will the plaintiff takes both positively and negatively, for I observe that the father forgave him debts. It is reasonable to suppose that the plaintiff, if he had considered that he had any cause for complaint, would at the death of his father, have so complained: but he waits till the statute of limitations has run upon the simple contract debts, and barred the father's executors of their remedy against him. Under these circumstances, I do not see how it is possible to maintain this suit. I cannot look at this transaction upon the mere principle of bargain and sale: but I consider it as a mixed case of bargain and sale, and of family arrangement. I will read the judgment in *Newman* v. *Rogers*, and if I change my opinion will mention it to-morrow.

Nov. 14. The case of *Newman* v. *Rogers*, makes no alteration in my former opinion, and therefore the appeal must be dismissed.

NEWMAN v. ROGERS.

Francis Newman, being seized in fee simple of the rectory of *Queen Camel*, of several estates called the *North Leaze Park*, the *Sparkford*, and the *South Cadbury* estates, and of other freehold and copyhold estates, by his will dated the 30th of May, 1767, devised the same to his nephew *Francis Newman* for life, with remainder to the first and other sons of the said *Francis Newman* in tail male, with remainder to his nephew *Henry Newman* for life, with remainder to his first and other sons in tail male, with divers remainders over, and with a power to the tenants for life, when in possession, to settle any part of the estates not exceeding in value 200*l.* a year, upon any woman they might marry for her life.

The Testator died in 1768, leaving the said *Francis Newman* and *Henry Newman* the devisees him surviving. The said *Francis Newman* had three daughters, but no issue male; and the said *Henry Newman* had issue a son, *Francis Newman* the younger, who was the first tenant in tail male of the devised estates.

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In the year 1778, the said *Francis Newman* the younger intermarried with one of the daughters of the said *Francis Newman* the elder; and in the month of May 1780, having just attained twenty-one, he concurred with the said *Francis Newman* the elder, in suffering a recovery of the devised estates, and in resettling them, to the use of the said *Francis Newman* the elder for life, with remainder to his first and other sons in tail male, with remainder to the said *Henry Newman* for life, with remainder to *Francis Newman* the younger in fee.

Shortly after the death of the Testator, and in pursuance of the power given by his will, the rectory of *Queen Camel*, (which appeared to be of the yearly value of 200*l.*) was limited to *Jane*, the wife of the said *Francis Newman* the elder, for her life; and by Indentures of lease and release, dated the 14th and 15th of Feb. 1783, the said *Francis Newman* the younger, in consideration of the settlement after mentioned, conveyed his remainder in fee in the said rectory, and in *North Lease Park* estate, (which was of the yearly value of 120*l.*) to *Henry Simpson*, and *Simon Payne*, and their heirs; to the use of the said *Francis Newman* the elder for life, with remainder to the use of the said *Jane* his wife for life; with remainder to the use of such of the daughters of the said *Francis* and *Jane*, as the said *Francis* should by deed or will appoint, and in default of appointment, to the uses mentioned in the release. By other indentures, of the same date, the said *Francis Newman* the elder, and *Francis Newman* the younger, conveyed the *Sparkford* and *South Cadbury* estates, (which appeared to be of the yearly value of 520*l.*) to *Thomas Watson*, and the said *Simon Payne*, and their heirs, (subject to the remainders to the first and other sons of the said *Francis Newman* the elder, and to the remainder to the said *Henry Newman*, during his life.) Upon trust, during the joint lives of the said *Francis Newman* the younger, and *Frances* his wife, to pay an annuity of 100*l.* out of the rents and profits to the said *Frances*, for her separate use; and to permit the said *Francis Newman* the younger, to receive the surplus of such rents for his life; and after the decease of both, upon trust for such child or children of the said *Francis Newman* the younger, and *Frances* his wife, as they should by deed appoint; and in default of such appointment, in trust for their daughters, as tenants in common in fee, and if only one daughter, in trust for her in fee; and in default of such issue female, in trust for their younger sons, as tenants in common in fee, and in default of such issue, in trust for the eldest son in fee; and in default of all such issue, in trust for the right heirs of the said *Francis Newman* the younger.

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It was admitted, that at the period when the last mentioned deeds were executed, *Francis Newman* the younger, was in distressed circumstances, and that *Francis Newman* the elder, was then of the age of sixty-five years, and *Jane Newman* his wife, of the age of fifty-four years.

The original Bill, which was filed by *Francis Newman* the younger, against the said *Simon Payne* and *Francis Newman* the elder, alleged, that upon the marriage of the plaintiff, the said *Francis Newman* the elder, had agreed to surrender to the plaintiff his life interest in the *Sparkford* and *South Cadbury* estates, as the marriage portion of his daughter; and that it had been agreed that in the deeds for suffering the recovery a power should be given to the plaintiff and to the defendant *Francis Newman* the elder, jointly to grant leases and copies of court roll of the devised estates, for their joint benefit, but that by fraud and imposition practised by the defendant *Francis Newman* the elder the *Sparkford* and *South Cadbury* estates had not been conveyed in any other manner than by the indentures of the 14th and 15th of February, 1783; and the power of granting leases and copies of court roll had been reserved to the defendant *Francis Newman* the elder, separately for his own benefit. The Bill also alleged that the plaintiff had been fraudulently induced to execute the several indentures of lease and release of the 14th and 15th of *February*, 1783; and prayed that the said *Francis Newman* the elder, might be decreed to account for the rents and profits of the *Sparkford* and *South Cadbury* estates, from the time of the plaintiff's marriage, until the possession was delivered to the plaintiff, and to pay what upon taking such account should be found to be due; that the power obtained by the defendant, for granting leases and copies of court roll of the devised estates, might be set aside for fraud and imposition; and that the defendant might be decreed to deliver up, or procure to be delivered up to be cancelled, all the leases and copies of court roll which had been granted by him under the power; or that a moiety of the fines received by the defendant by virtue of such leases or copies, and a moiety of the rents thereafter to be received therefrom, might be paid to the plaintiff; and that the Indentures of lease and release of the plaintiff's two several reversions obtained by the defendant from the plaintiff might be set aside; and that the defendant might be decreed to join in reconveying the same to the plaintiff; or in case the defendant had conveyed the *North Leaze Park* estate to a purchaser for valuable consideration without notice, that the defendant might make satisfaction to the plaintiff for the full value thereof.

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Francis Newman the elder died in 1796; and upon his death a supplemental bill was filed against his executors, and against *Catherine Rogers*, one of his daughters, who claimed to be entitled to the remainder in fee in the Rectory of *Queen Camel*, as appointee under the power reserved to *Francis Newman* the elder, by the first mentioned indenture of release of the 15th of *February*, 1783.

The defendant *Francis Newman* the elder pleaded the Statute of Frauds in bar of the discovery and relief prayed by the bill, so far as it related to the agreement alleged to have been made upon the marriage of the plaintiff; and in answer to the other parts of the bill the defendant denied that he had ever agreed with the plaintiff that the powers mentioned in the bill should be reserved to the plaintiff and the defendant for their joint benefit, or made any such agreement; or that he had practised any fraud or imposition upon the plaintiff: And he stated that the consideration which he paid for the conveyance of the reversions by the plaintiff was the release of the *Sparkford* and *South Cadbury* estates, which he believed to be a fair consideration. The answer also stated that the *North Lease Park* estate had been settled upon the marriage of *Jane*, one of the daughters of the defendant.

The cause was heard on the 27th, 28th, and 29th of *June*, 1809, and was ordered to stand for judgment on the 1st of *August*, 1811.

The decree directs that the plaintiff's bill, so far as it seeks to charge the late defendant *Francis Newman* the elder with fraud and imposition in obtaining the power of granting leases and copies of court roll of the devised estates, and to have such power set aside, and so far as it seeks to have an account of the rents and profits of the *Sparkford* and *South Cadbury* estates from the time of the marriage of the plaintiff, shall stand dismissed without costs. It then declares that the plaintiff is entitled to have the rectory of *Queen Camel* reconveyed to him, and to have the rents and profits thereof, accrued since the death of the late defendant *Francis Newman*, accounted for and paid to him; and to be paid out of the assets of the said late defendant the value of the estate called *North Lease Park*, and the amount of the rents and profits thereof accrued since the death of the said late defendant. It then directs accounts to be taken of the rents and profits of the *Sparkford* and *South Cadbury* estates, received by the plaintiff in the lifetime of the said late defendant, and of the rents and profits of the rectory of *Queen Camel*, received since

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the death of the said late defendant by the defendants his executors; and after further directing the value of the *North Lease Park* estate, and the amount of the rents and profits thereof which would have accrued since the death of the said late defendant to be ascertained, and ordering that what shall be coming on account of the rents and profits of the *Sparkford* and *South Cadbury* estates be deducted from the value of the *North Lease Park* estate and the rents and profits thereof, it proceeds to direct, that what shall remain due to the plaintiff after such deduction, and the plaintiff's costs of so much of the suit as relates to the rectory of *Queen Camel* and the *North Lease Park* estate, be answered by the defendants the executors out of the assets of the said *Francis Newman* the elder, and that all proper parties reconvey the rectory of *Queen Camel* to the plaintiff and his heirs.

Reg. Lib. B. 2. 1810, fol. 147.

Nov. 21—3—5.

ROPER *v.* WILLIAMS.

Injunction to restrain the breach of a covenant, that buildings shall be erected upon a general plan refused: the covenantee having acquiesced in a partial deviation from the plan, and not having made immediate application to the Court.

A landlord who relaxes in favour of some of his tenants a covenant entered into for the benefit of all is not entitled to an injunction to restrain the other tenants from infringing that covenant.

THE Bill in this cause stated that by indentures of lease and release, dated the 26th and 27th of March 1816, the defendant *Williams*, for a valuable consideration in money, conveyed to the plaintiff his heirs and assigns, a piece of ground, adjoining on the south upon an intended road, and on the north east and west upon other lands belonging to the defendant; and that by the said indenture of release the said defendant covenanted that he his heirs appointees and assigns, would not at any time thereafter erect or suffer to be erected on the land belonging to him on the north side of the ground thereby conveyed any buildings whatsoever, and that all messuages tenements and buildings, to be erected by him his heirs appointees and assigns or any person or persons claiming under him or them, on the land belonging to him adjoining on the east and west sides of the

said ground thereby conveyed, should be built in a line thirty feet from the said intended road, and that the same should be detached houses, and not less than of the third rate or class of building.

The bill then stated that the defendant *Williams* had entered into an agreement to sell and was about to convey to *John Piper Burnard*, another of the defendants, part of the land belonging to him to the west of the plot conveyed to the plaintiff, without requiring any stipulation that *Burnard* should refrain from building houses in a manner not conformable to the beforementioned covenant; and that the defendant *Burnard* had agreed to let the land, so agreed to be purchased by him, to the other defendant *John Miller*, for the purpose of building houses of an inferior description, and differently situate from those specified in the covenant; and that the defendant *Miller* had commenced building accordingly.

The bill prayed an injunction to restrain the defendants from erecting, or causing or permitting to be erected, on the ground which belonged to the defendant *Williams* at the time of the execution of the indentures of the 26th and 27th *March* 1816, adjoining to the east and west sides of the ground conveyed to the plaintiff, and particularly on the ground stated to have been agreed to be sold to *Burnard*, any messuages tenements or buildings, except in the manner mentioned in the aforesaid covenant of the defendant *Williams*.

The injunction was granted on the 23rd of *May*, upon certificate of the bill filed, and an affidavit of the facts above stated. The defendants now moved to dissolve it upon affidavits which stated that the covenant entered into by *Williams* with the plaintiff was never intended to extend beyond the ground immediately adjoining on the east and west sides of the land sold to the plaintiff; and that a strip

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of ground lying between the plaintiff's land, and the land agreed to be sold to *Burnard*, and extending 121 feet to the west of the plaintiff's land, had been sold to a Mr. *Tomlinson*, who was restricted from building in any manner not conformable to the covenant. The affidavits also stated, that early in the year 1818 the plaintiff had served the defendant *Burnard* with notice not to proceed in the erection of some houses, the carcases of which were then complete, and which were of a different class from those specified in the covenant, and at a different distance from the intended road; but that on being shewn the opinion of counsel that the rights under the covenant could not be insisted upon, the plaintiff had taken no steps to enforce the notice, and had permitted the defendant to complete the buildings. The affidavits further stated that the houses in question in the cause had been commenced early in the year, and had been proceeded with until the injunction was granted. The construction of the covenant set up by the defendants was denied by the plaintiff who filed counter-affidavits. The motion to dissolve the injunction had been made before the *Vice-Chancellor*, and refused.

Mr. *Agar* and Mr. *Roupell* for the defendant *Williams*.

Mr. *Shadwell* and Mr. *Temple* for the defendants *Burnard* and *Miller*.

In support of the motion.

The Court will grant injunctions of this nature only where the mischief is irremediable, not in a case like the present, where there is merely a diminution of value, and damages will be a sufficient compensation. *Attorney General* v. *Nichol*. (*a*) The plaintiff has waived the benefit of the covenant by allowing houses to be built in violation of it, and

(*a*) 16 Ves. 342.

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he cannot now be permitted to complain. His application for the special interference of the Court ought to have been made at the earliest period. He must be left to his remedy at law upon the covenant.

Mr. *Horne* and Mr. *Spence* for the plaintiff.

Relied upon the construction of the covenant, as intended to embrace all the houses to be built upon the land belonging to *Williams*; and insisted that the acquiescence of the plaintiff in not complaining of the erection of buildings, by which the covenant was infringed in a partial degree, could not preclude him from relief against the more gross violation which was now attempted.

THE LORD CHANCELLOR.

This deed was made by a gentleman, who seems to have possessed land to the north, east, and west, of the piece of land bought by Mr. *Roper*. No question arises as to the land to the north: but as to the land on the east and west one question is, whether the word "adjoining" contained in the covenant includes all the land adjoining to the east and west to the utmost extremity in each direction, or whether it includes only a small portion immediately adjoining. It has been contended on the part of the defendant *Williams*, that it includes only the parts immediately adjoining: but I do not see how they can put that construction upon it, because the covenant extends to all the messuages to be built on the east and west sides, and according to their construction it would be exhausted by a single messuage. In my view of the case it includes all the land to the east and west as far as the utmost extremity in both those directions.

This case is not within the range of cases between A. and B.: but it is a case in which persons claiming under A. have in equity acquired rights both against A. and B., which

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could not well be treated of in a court of law. If the matter were *res integra*, I should say that *Williams* had bound himself in equity to make no new grant, without giving notice of this covenant to all subsequent grantees. The object which *Williams* had in view seems to have been, to have laid out the whole of the land upon a general plan, and to get as many grantees as he could to be subject to the same obligations as *Roper*; and the covenant entered into by *Williams* with *Roper* was for the benefit of all such grantees. Having long lived in *Gower Street*, I have often been in the habit of illustrating my view of such cases by reference to the stipulations contained in the Duke of *Bedford's* leases. In the lease of every house on the east side of that street is contained a covenant that there shall be no erection behind them exceeding a certain height. The landlord in such a case is stipulating not only for his own benefit but for the benefit of all the tenants in that neighbourhood. If therefore the landlord in some particular instances lets loose some of his tenants, he cannot come into equity to restrain others from infringing the covenant to whom he has not given such a licence. He may have a good case for damages at law; but if he thinks it right to take away the benefit of his general plan from some of his tenants, he cannot with any justice come into equity for an injunction against those tenants. It is not a question of mere acquiescence: but in every instance in which the grantor suffers grantees to deviate from a general plan intended for the benefit of all, he deprives others of the right which he had given them, to have the general plan enforced for the benefit of all. In such cases I have always understood this Court will leave the parties to their remedy at law.

There is another view in which this case may be considered: every relaxation which the plaintiff has permitted in allowing houses to be built in violation of the covenant amounts *pro tanto* to a dispensation of the obligation intended to be contracted by it. Very little in cases of this

nature is sufficient to shew acquiescence; and courts of equity will not interfere unless the most active diligence has been exerted throughout the whole proceeding. It is not sufficient to have given notice of the covenant in 1818. In every case of this sort the party injured is bound to make immediate application to the Court in the first instance; and cannot permit money to be expended by a person, even though he has notice of the covenant, and then apply for an injunction. Taking all the circumstances together, the permission to build contrary to the covenant, and the laying by four or five months before filing the bill, this is not a case in which a court of equity ought to interfere by injunction; but the plaintiff must be left to his remedy at law.

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Injunction dissolved.

CARLETON *v.* L'ESTRANGE.

Nov. 27.

IN this case, a plea having been put in by the defendant, the plaintiff filed a replication, and afterwards, before the plea was set down to be argued, obtained an order upon motion of course to withdraw the replication, and amend the bill.

After plea pleaded, and replication filed, and before the plea set down, it is not a motion of course to withdraw the replication, and amend the bill.

An order for that purpose, obtained of course, discharged for irregularity, and the amended bill ordered to be taken off the file.

It was now moved on the part of the defendant, that the order obtained by the plaintiff might be discharged with costs for irregularity, and that the amended bill might be taken off the file.

Mr. *Horne* and Mr. *Roupell* for the motion.

Mr. *Cooper* against it.

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The LORD CHANCELLOR.

It is a very usual thing when an answer is put in for a plaintiff to withdraw his replication and amend his bill, in some cases without notice of motion, and in other cases with notice. The question here is, whether after plea pleaded and replication filed, and before the plea is set down to be argued, you can move to withdraw the replication and amend the bill, as a motion of course, or whether you must not give a notice of motion. I have made inquiries upon the subject, and I cannot find a single instance where this has been done upon a motion of course after plea pleaded and replication filed; and I do not see how it can be done, because something must be done about the plea. In the case of an answer, if you withdraw the replication and amend the bill, the answer still stands, as a species of answer at least, to so much of the original bill as remains: but with respect to the plea, which puts an end to the cause altogether, unless the Court goes on to do something with it, there will be an amended bill with a plea remaining on record, not as part of an answer, (there being no order that it should stand as an answer with liberty to except) but as a plea to the whole of the original bill. While the plea remains, the amendment cannot be made, without the Court interposes to regulate the record in order that it may stand right. The motion must be granted, and I do not see any way of going to work except by taking the amended bill off the file: but I will give the other party an opportunity of speaking to that.

The motion was not mentioned again; and an order was made that the order obtained by the plaintiff should be discharged for irregularity, and that the amended bill should be taken off the file.

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BEARD *v.* WESTCOTT.

Nov. 28.

Devise to A. for ninety-nine years, if he should so long live; remainder to his first son, then unborn, for ninety-nine years, if he should so long live; and so on in tail male to such first son lawfully issuing for ever; and for want and in default of such issue of such first son, to the second and other sons successively for ninety-nine years only, in case he should so long live; and that such elder son or the issue of such elder son should have no greater estate than for ninety-nine years, determinable at his decease; and if there should be no issue male of A., at the time of his (A.'s) death, or in case there should be such issue male at that time, and they should all die before twenty-one without issue male, then to B. for ninety-nine years, if he should so long live; remainder to the first son of B. for ninety-nine years, if he should so long live, &c.: held, that A. took under the will an estate for ninety-nine years in the freehold estates, determinable with his life, and the same estate in the leasehold, if they should so long continue; and that, upon his death, his first son would take an estate for ninety-nine years in the freehold, determinable with his life, and the remainder of the term in the leaseholds: but that the limitations to the second and other unborn sons of A. were void as tending to perpetuity; and the limitations over to B., &c. after these void limitations were not accelerated, but were void also.

UPON the hearing of this cause a case was sent for the opinion of the Court of Common Pleas. The questions submitted to the consideration of that court, and the certificate of the judges, are reported in 5 Taunt. Rep. 392.

A case was afterwards sent for the opinion of the Court of King's Bench, which, with the certificate of the judges of that Court, is reported in 5 *Barn.* and *Ald.* 801.

The certificate of the two courts were conflicting.

The cause came on for further directions.

Mr. *Hart* and Mr. *Stephen*

Contended, that the Court of King's Bench had not returned a sufficient answer to the case; and that it could not be collected from their certificate, whether the circumstance that the limitations were to take effect at the end of a term of 21 years, without reference to the infancy of the person intended to take, created such a suspense of the vesting as to render the limitations void.

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Mr. *Sugden* for the plaintiff

Insisted that the conclusion to which the Court of King's Bench had come involved the decision of the point.

The LORD CHANCELLOR.

It is impossible that the Court of King's Bench should not have considered that point. The certificate of that Court appears to me to afford a substantial answer to the questions put; and, under the circumstances of this case, I think the best thing I can do is to confirm it, and thus to help the case to the House of Lords, if the parties think it right to take it there. The inclination of my opinion is that the Court of King's Bench is right.

Certificate confirmed,

NOUAILLE *v.* GREENWOOD.

Nov. 25, 28.

Equitable tenant in tail alieus in fee by way of mortgage; a good equitable recovery may be suffered of the secondary equitable estate without the concurrence of the mortgagee.

THE Bill in this cause prayed the specific performance of a contract for the purchase by the defendant of an estate at *Tonbridge*. The master reported that a good title could not be made; exceptions were taken by the plaintiff to the master's report, and allowed by the *Vice-Chancellor*. From the order allowing the exceptions the defendant appealed.

The objection to the title arose from a recovery suffered by a person of the name of *Isabella Cooke* in the year

1746: it was inferred from the recovery that an estate tail had previously existed, which it was alleged had not been effectually barred by the recovery, because the legal estate was in a mortgagee who had not joined in making the tenant to the præcipe.

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NOUAILLE v. GREENWOOD.

The abstract stated a fine levied in Hilary Term 1741 of an estate at *Tonbridge* by *John Cooke* and *Isabella* his wife; and the will of the said *John Cooke* dated the 24th of *June* 1743, which contained a recital, "that his wife had passed a fine of all her estate at *Tonbridge*, and had settled the same in trustees, and had given them a power to raise the sum of 400*l.* and to make the said estate chargeable with the payment thereof;" and by which in case of his death before the said sum should be raised he charged the said estate therewith.

The abstract further stated indentures of lease and release dated the 19th and 20th of *May*, 1746, whereby *Isabella Cooke*, her husband being then dead, conveyed the estate in question to the use of *John Stow* in fee, subject to redemption; and an indenture of bargain and sale dated the 18th of *June*, 1746, whereby, for barring all estates tail, she conveyed the premises to *Joseph Curzon* in fee, to make him tenant of the freehold for suffering a recovery, which it was declared should enure to the use of her, *Cooke*, in fee. A recovery was suffered accordingly in Trinity Term 1746, in which she was vouched.

The abstract further stated indentures of lease and release dated the 7th and 8th of July, 1746, and made between *Stow* of the first part, *Cooke* of the second part, and *Sidney Stafford Smyth*, Esq. (afterwards one of the Barons of the Court of Exchequer,) of the third part, by which *Stow* and *Cooke* conveyed the premises to *Smyth* as a security for the original mortgage money and a further sum

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advanced by him. It then stated the will of *Isabella Cooke*, by which she devised to *Edward Lloyd* in fee; and an indenture dated the 21st of *November*, 1749, by which a further sum advanced by *Smyth* was secured upon the mortgaged premises.

From 1749 to the present time the estate had been held under the title of the mortgagors.

Mr. Sugden and *Mr. Barber* for the defendant the purchaser

Insisted that the presumption from the recovery was, that a legal estate tail existed, especially as the husband's will referred to a settlement; and that a reconveyance from the mortgagee could not be presumed, as he had conveyed subsequent to the recovery.

Mr. Hart, *Mr. Preston*, and *Mr. Seton*, for the plaintiffs.

There is no evidence of any estate tail; it is mere suspicion ending in suspicion, and cannot be the legitimate ground of legal decision. (*a*) The settlement referred to inthe will is no evidence of an estate tail. Nothing is more common than recoveries suffered without reason.

At this distance of time every thing must be presumed to have been rightly done. The assignment of the mortgage to Sir *S. S. Smythe*, and the continued enjoyment ever since, exclude all doubt upon the question. *Sperling* v. *Trevor*, (*b*) *Mc Queen* v. *Farquhar*, (*c*) *Coussmaker* v. *Sewell*. (*d*)

(*a*) Per Dallas, C. J. in *Gorton* v. Sir *T. Champneys*, C. P. 23rd *Nov.* 1822.

(*b*) 7 Ves. 497.

(*c*) 11 Ves. 467.

(*d*) Sugd. Vend. and Purch. App.

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The will of *John Cooke* in 1743 is evidence, that under some fine there was a settlement in trustees: but whether the legal estate was vested in them, or merely a power given to raise a charge on the estate, does not precisely appear. Although the expressions are inaccurate, the presumption seems to me to be that the legal estate was vested in the trustees.

The settlement is not noticed in the deed to lead the uses of the recovery: but although there is no doubt that many recoveries have been suffered unnecessarily, it is reasonable to suppose that this recovery was suffered with reference to the settlement. If then the legal estate was in the trustees, the mortgage in fee conveyed to *Stowe* only an equitable estate, and then a good equitable recovery might be suffered of the secondary equitable estate without the concurrence of the mortgagee. (*a*)

At the time of the transfer of the mortgage to Sir *S. S. Smythe*, there is no evidence that he had all the antecedent instruments before him: but it is a strong thing to say that the title was not examined. We ought to give credit to men of eminence in the profession who were dealing for their own security, and therefore must conceive that the title was not accepted without examination.

Besides this there has been continued enjoyment under the title as contended for by the plaintiff; although I cannot say that ingenuity will not find objections to the title. There is no doubt that it is better than ninety-nine out of one hundred.

Appeal dismissed.

(*a*) This point is stated as a question open to decision in a note by Mr. *Butler* to p. 61. of the last edition of *Fearne*. See also *Casborne* v. *Scarfe*, 1 Atk. 603.

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ROLLS, *Dec.* 2.

Before *Graham*, Baron, and *Masters Stephen*, and *Courtenay*, for the *Master of the Rolls*.

Upon the hearing of an interpleading bill, evidence is admissible to shew that the plaintiff has retained possession of the subject of the suit under an indemnity from some of the defendants.

THE bill in this cause prayed, that the defendants might be directed to interplead as to a bond which had been deposited with the plaintiff for safe custody. The usual affidavit was annexed to the bill.

On the part of some of the defendants evidence was offered of the plaintiffs having retained the bond in question under an indemnity from the other defendants. It was objected by the plaintiff that the evidence was not admissible; and in support of the objection it was argued, that no evidence could be adduced on a bill of this description to affect the plaintiff, and that the question of indemnity was not in issue between the parties. On the other hand it was contended that the evidence offered entirely defeated the equity of the plaintiff's case, which depended upon the fact of his not being connected with either party, and that the affidavit formed part of the record.

Mr. *Wingfield* and Mr. *Evans* for the plaintiffs.

Mr. *Horne* and Mr. *Koe* for some of the defendants.

Mr. *Lowndes* for the other defendants.

Graham, Baron.

The question before the Court is, whether this is a proper interpleading bill. The evidence offered tends to shew that the plaintiff, instead of resting upon the indemnity of

the Court, has taken a security by way of indemnity, and lent his name for the purpose of bringing forward the case in the shape of an interpleading suit. We are of opinion that evidence which tends so much to shew the complexion of the bill must be admitted, and that it forms a material feature in the case.

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The case was afterwards argued upon the merits, and the bill was dismissed with costs.

Sir EDMUND BACON, PLAINTIFF,
AND
WILLIAM BEAUCHAMP PROCTOR and Others,
DEFENDANTS.

Before *Graham*, Baron, and *Masters Simeon*, and *Stratford*, for the *Master of the Rolls*.

ROLLS,
Dec. 4, 6.

The plaintiff's father, upon the marriage of his daughters, demises an estate to trustees, upon trusts for raising certain sums, which are settled upon the daughters and their children; and by his will, after charging the estate with other sums to be settled upon the same trusts, with portions for sons, and with a further sum in discharge of a mortgage of another estate, devises it to other trustees, upon trust from time to time to receive the rents and profits, and to invest the same in the purchase of stock, so as to accumulate and form a fund for the payment of the aforesaid charges; "and after the same should have been raised and paid, upon trust to pay the net rents, issues, and profits unto or for the benefit of such person of his own name, blood and family, as for the time being should succeed to and be invested with his title and dignity of a baronet, to the end that his said estate might be continued in his name, blood, and family, and be enjoyed and go along with his title, so long as the rules of law and equity would permit; but if upon failure of issue male of his body there should not be any person who should be entitled to enjoy his title, upon trust to stand seized of the estate, for the benefit of the person or persons who should be his right heir or heirs at law, and to convey and assure the same accordingly; held that the trust for accumulation was good, and that the plaintiff, the succeeding baronet, took a vested estate for life.

SIR *Edmund Bacon*, premier baronet of England, by his will dated the 19th of *June* 1815, after reciting,

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that he had issue then living, five children, *viz.* ***Edmund Bacon*** his eldest son, and ***Ann Frances Hussey, Nicholas Bacon, Maria Hodge,*** and ***Henry Bacon*** his younger children; and that by a settlement made previously to the marriage of his said daughter ***Ann Frances*** with ***Edward Thomas Hussey,*** Esq. he had granted and demised certain parts of his estate in *Chancery Lane* and its vicinity to trustees for the term of 500 years, upon trust to raise the sum of 2500*l.* within three months next after his decease, and to stand possessed thereof upon trusts for the benefit of the said *Edward Thomas Hussey* and *Anne Frances* his wife, and their issue; and that by a settlement made previously to the marriage of his said daughter *Maria* with *Edward Hodge,* Esq. he had granted and demised other parts of his said *Chancery Lane* estate to other trustees for the like term of 500 years, upon trust to raise another sum of 2500*l.* within three months next after his decease, and to stand possessed thereof upon trusts for the benefit of the said *Edward Hodge* and *Maria* his wife and their issue; and after further reciting that he had advanced to his son the said *Henry Bacon* the sum of 3000*l.*, 2000*l.* of which he had borrowed upon mortgage of his estate at *Thorpe* in the County of *Norfolk;* subjected and charged his said *Chancery Lane* estate to and with the payment of the sum of 4000*l.* with interest at the rate of five per cent. per annum, from the time of his decease, and directed that two sums of 500*l.* and 500*l.*, parts of such sum of 4000*l.*, should be paid to the trustees of the marriage settlements of his said two daughters upon the trusts declared by such settlements respectively of the sums of 2500*l.* and 2500*l.* thereby directed to be raised; and that 3000*l.*, the residue of the said sum of 4000*l.*, should be paid to his son the said *Nicholas Bacon.* The testator then charged the said *Chancery Lane* estate with the further sum of 2000*l.*; and directed the same to be raised by his trustees out of the rents and produce of that estate, and applied in discharge of the before mentioned mortgage of 2000*l.*, and in-

terest, and to the trusts of the said several terms of five hundred years and five hundred years respectively created by the marriage settlements of his said two daughters, the said testator gave and devised the said *Chancery Lane* estate unto and to the use of the trustees named in his will their heirs and assigns for ever; upon trust from time to time to receive the rents and profits thereof; and after keeping the same in proper repair, and paying all necessary outgoings in respect thereof, to pay and keep down out of the net rents and profits the interest of the said two several sums of 2500*l.* and 2500*l.* respectively directed to be raised under the trusts of the said several terms of five hundred years and five hundred years, and of the said sums of 4000*l.* and 2000*l.* so thereby charged as aforesaid, and subject thereto, upon trust to lay out and invest all the residue of such net rents and profits in the public stocks or funds in their names at interest, and from time to time to place out and invest in like manner all the dividends or annual proceeds which should arise or accrue from such stocks or funds, and from the stocks or funds upon which such dividends or annual proceeds might be so placed or invested as aforesaid; so that the said residuary or overplus rents and profits, and the dividends or annual proceeds of the stocks or funds upon which the same might be respectively placed or invested, might accumulate until a fund should be created sufficient to answer pay and satisfy the said two several sums of 2500*l.* and 2500*l.* respectively directed to be raised and paid under the trusts of the said several terms of five hundred years and five hundred years, at which period the said testator directed that the said two several sums of 2500*l.* and 2500*l.* should be respectively raised and paid out of such accumulated fund accordingly; and after payment of the said several sums of 2500*l.* and 2500*l.* the said testator directed his said trustees to place out and invest all such residuary or overplus rents issues and profits as aforesaid, so that the same might accumulate in like manner until a fund should be created suf-

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ficient to answer pay and satisfy the said sums of 4000*l.* and 2000*l.* so thereby charged on his said estate as aforesaid, when he directed that such accumulated fund should be sold and disposed of, and the produce thereof applied in payment of the same in the proportions and manner thereinbefore mentioned and directed. And after the said several sums of 2500*l.* and 2500*l.* and 4000*l.* and 2000*l.* respectively should have been fully raised and paid, the said testator directed his said trustees from time to time to pay apply and dispose of all the net rents and profits of his said estate unto or for the benefit of such person of his own name blood and family, as for the time being should succeed to and be invested with his title and dignity of premier baronet of *England;* to the end intent and purpose that the said estate might be continued and preserved in the name blood and family of him the said Sir *Edmund Bacon*, and that the net rents and profits thereof might be enjoyed and go along with his said title and dignity of premier baronet of *England* so long as the rules of law or equity would permit: but if upon or after failure of issue male of his body, there should not be any person who under or by virtue of the letters patent whereby his said title or dignity was originally granted or created should be entitled to have and enjoy his said title and dignity of premier baronet of *England*, so that such title and dignity should become extinct, then and in such case and from thenceforth the said testator willed and directed that his said trustees, and the survivors and survivor of them, and the heirs and assigns of such survivor, should subject and without prejudice to the trusts and directions thereinbefore declared and contained, stand and be seized of and interested in his said estate in trust for or for the benefit of the person or persons who should then be his right heir or heirs at law, and should convey and assure the same accordingly. And after giving to his eldest son the said *Edmund Bacon* the use and enjoyment during his life

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of a certain piece of plate, and directing that after the decease of his said son, the same should be held, used and enjoyed by the person or persons for the time being who should succeed to his title and dignity of premier baronet of *England* so long as the rules of law or equity would permit, the testator devised all his other real estates, and also all his personal estate not specifically bequeathed to his said eldest son, his heirs executors and administrators. He afterwards made two codicils dated respectively the 22*d July* 1818, and the 5*th April* 1820. By the first of which he revoked the appointment of one of the trustees named in his will; and by the second of which he revoked the bequest of 1000*l.* and interest, part of the sum of 3000*l.* and interest given by his will to his son *Nicholas*, and directed that the sum of 2000*l.* only should be paid to him with the interest in the manner directed by his will respecting the sum of 3000*l.*

The testator died on the 5*th* of *September* 1820, leaving Sir *Edmund Bacon* his eldest son and heir at law, and the four other children named in his will surviving. Sir *Edmund Bacon* the son had issue living at the death of the testator, two sons *Edmund* and *Nicholas Henry Bacon*. And the said *Nicholas Bacon* had issue then living a son *Henry Hickman Bacon*: but there had never been any other male issue of the sons of the testator. The daughters of the testator had issue several children living at the time of his death.

The bill was filed by Sir *Edmund Bacon*, against the trustees of the will of the testator, and of the marriage settlements of his daughters, and against the said four other children of the testator, and his said grandchildren; and after stating the letters patent by which the dignity of a baronet was conferred on and limited to Sir *Nicholas Bacon* and the heirs male of his body, and that the dignity had descended upon the testator, and upon his death had

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devolved to the plaintiff, who was entitled thereto in tail male, the plaintiff insisted that the trusts of the testator's will and his second codicil, or at least such of them as were subsequent to the trusts or directions for accumulation contained in the will, were absolutely void as being too remote and tending to a perpetuity: and that as heir at law of the testator he was entitled to have the real estates respecting which such trusts had been declared, conveyed to him in fee simple, subject only to the charges created by the testator in his lifetime, or at least subject only to such charges and the charges created by his will and second codicil and to the trusts for accumulation so far as the same were legal. But if the Court should be of opinion that all the trusts of the will and codicil were valid, then the plaintiff submitted that as answering the description of the first person of the testator's name blood and family, who had succeeded to and was invested with the title or dignity of premier baronet of England, he was entitled to the real estates in question in fee simple, or at least in tail male, subject to the charges trusts and directions aforesaid, and that he was entitled to have the amount of such charges forthwith raised by sale or mortgage of the said estates, and to be let into possession of such of the said estates as should not be sold as from the death of the testator, subject, in case the amount of the charges should be raised by mortgage, to such mortgage. He further contended that the legal estate, subject to such mortgage if the same should be made, ought to be conveyed to him forthwith without waiting till the amount of the charges should be raised by accumulation. But in case the Court should be of opinion that the plaintiff was not entitled to a larger interest than an estate for life, and that the amount of the charges ought not to be raised by sale or mortgage, the plaintiff insisted that he ought to be at liberty to pay off the charges out of his own monies, and the monies which had accrued or should accrue from the rents of the said premises, and to be let into the possession of the said premises, and that in case of his

decease before he should be reimbursed out of the rents and profits, the deficiency ought to be a charge upon the premises for the benefit of his estate. The prayer of the bill was accordingly.

The defendants *Edmund Bacon* and *Nicholas Henry Bacon* by their answer insisted, that the trusts contained in the will and second codicil of the testator were valid and legal; and that the plaintiff was not entitled to a larger interest than an estate for his life in the premises of which the aforesaid trusts were declared by the will.

The defendants *Nicholas Bacon*, *Henry Bacon*, and *Henry Hickman Bacon*, submitted that the sums by the will and codicil of the testator charged upon the said estate ought to be raised out of the rents and profits thereof, and that subject to the payment of such sums the estates ought to be settled as the Court should direct, so as to go to the person or persons who for the time being should be entitled to the dignity of premier baronet of *England* for as long a time as the rules of law and equity would permit.

The defendants the daughters of the testator, and their children, claimed to have the sums by the will and codicil of the testator given for their benefit raised out of the estate on which they were charged.

Mr. *Shadwell* and Mr. *Preston* for the plaintiff.

This is a case *primæ impressionis*, with respect to the trusts for accumulation they are void as far as the grandchildren are concerned, for the statute 39 and 40 *Geo.* 3. c. 98. only excepts accumulations for the payment of debts, and portions of children, and grandchildren are not within the exception. In the next place this is a trust executed,

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and not executory, which distinguishes this case from *Humberston* v. *Humberston* (*a*) and the other cases in which the Court has acted upon the *cypres* doctrine. Here the testator has executed his own purpose, he has suspended the vesting of the estate till after the payment of debts an indefinite time which cannot be ascertained by the Court. The devise therefore is void; and the trustees become seized of the legal estate in trust for the plaintiff as heir at law of the testator.

On the supposition however of the devise being supported, the next consideration is what was the intention of the testator, and what is the effect of his will. The intention is incompatible with law. It aims at an interest coextensive with the baronetcy. The law will not permit it to be effectuated beyond the extent of giving either an estate to the heirs male of the body of the first baronet, which would give an estate in tail male to the present plaintiff; or by giving successive estates for life within the rule against perpetuities, with remainder to the heirs male of the body of the first baronet.

Mr. *Horne* and Mr. *Sidebottom* for the sons of the plaintiff.

This is an executed gift in fee to the trustees; the beneficial interests must take effect immediately. The accumulation is a mode of payment only, for the sums secured by the two terms of five hundred years and five hundred years are antecedent charges on the corpus of the estate, and the sums of 4000*l.* and 2000*l.* charged on the estate by the will, are distinct charges, independent of the trusts for accumulation. The legatees of those sums would be entitled to have them raised, even if the trusts for accumulation should be held to be void. The words "from and after" do not

(*a*) 1 P. Wms. 332.

postpone in point of time, but only in order of interest. (*a*)

Admitting however that the vesting of the estates is to be postponed, there is no doubt that the trusts for accumulation are good to a certain extent; *Griffiths* v. *Vere*. (*b*) The consequence must be that the time must be cut down to the legal period of twenty-one years. At the expiration of the twenty-one years, the question will be who is entitled? It is clear that the testator never intended any resulting trust for the heir at law. There is sufficient ground for the Court to say that the plaintiff is only entitled for life with remainder over in strict settlement.

Mr. *Sugden* and Mr. *Rolfe* for the trustees of the will.

Two things are clear, first that the trust for accumulation is not void. Secondly, that the estates take effect immediately subject to the charges, *Tregonwell* v. *Sydenham*. (*c*) The only question is as to the person to take, and the quantity of interest. There are two difficulties, first that the dignity is an estate in tail male; secondly that it was not the intention of the testator to make the common limitations in strict settlement. The case of Lord *Deerhurst* v. The Duke of *St. Albans* (*d*) was attended with similar difficulties. The Court may determine that the plaintiff is entitled for life; and then stop or go on by declaring a remainder over to such person as at the plaintiff's death shall be premier baronet for life, or in tail, according as he was born before or after the death of the testator, (*e*) remainder to the heirs male of the body of the first baronet.

(*a*) Cases cited in *Fearne's* opinion on Lord *Bath's* case, 1 Coll. Jur. 214.

(*b*) 9 Ves. 127.

(*c*) 3 Dow P. C. 194.

(*d*) 5 Maddox 232.

(*e*) Litt. s. 352.

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Mr. *Wingfield* and Mr. *Blake* for the defendants *Nicholas Bacon*, *Henry Bacon*, and *Henry Hickman Bacon*.

Mr. *Roupell* for the daughters of the testator and their children, and for the trustees of the terms of five hundred years and five hundred years

Graham, Baron.

I will not postpone my judgment for further consideration, because I have formed my opinion on the first point. It has been contended that the plaintiff is entitled as heir at law because there is a trust for certain accumulations which look to an indefinite period, and no interest is given to any person till after the accumulation is determined. That is not my view of the case: my opinion is that the testator's intention was simply to provide a fund for some specific debts and charges, and then that the persons entitled should take. He had no intention of suspending the beneficial interest in the mean time till the debts and charges should be paid. All the authorities shew that where an estate is given to trustees to pay debts, and then to a person designated, the person designated takes at once subject to the debts.

This case is not open to any objection on account of the accumulation directed by the will. There is no accumulation for the purpose of suspension. The act of the 39th and 40th of *Geo.* 3. does not apply; and if it did, there is an express exception in the case of debts and portions. Under these circumstances it is quite clear that the enjoyment, and not the property, is tied up. And the estate vests in the same manner as if the testator had created a term for payment of his debts.

Having said thus much, it is not necessary to declare beyond the estate to which the present plaintiff is entitled,

The clearest view of the case therefore is to refer it to the master to take an account of the rents and profits, and to state the annual value, and also to enquire and state what the incumbrances are, and to declare the plaintiff entitled to an estate for life subject to the debts and charges; the plaintiff to be at liberty to lay proposals before the master for paying off the incumbrances.

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BEAUMONT *v.* BRAMLEY.

Nov. 27.
Dec. 11—12—13—14.

Bill to rectify a conveyance, alleged to have passed by mistake more than was included in a previous agreement, dismissed; the conveyance reciting a more extended agreement, the parties being dead, the agent of the grantor having acknowledged the extended agreement, and the agent of the grantee, who could have given a personal account of the transaction, not having been examined by the plaintiff.

A conveyance which passes too much may be rectified, and the excess deducted. An issue may be directed with a view to correcting a mistake in a deed semble.

THIS suit was instituted for the purpose of obtaining a reconveyance of a rectory, the legal estate in which was alleged to have passed, contrary to the intention of the parties, under general words inserted in the conveyance.

In the year 1788 *John Beaumont* was seized in fee simple of the impropriate rectory of the parish of *Sheepshead*, and of a farm in that parish consisting of a messuage and 224 acres of land, which, under an act of parliament passed in the year 1775, had been allotted to the then impropriator in lieu of the tithes of all the lands in the parish, except such tithes as might arise from a forest called *Charnwood Forest* part of the parish which was at that time wholly unproductive, but the tithes of which afterwards became valuable in consequence of its inclosure in the year 1808.

The bill was filed in *February* 1812, and it stated in addition to the facts abovementioned, that in the month of *November*, 1778, *John Beaumont* being desirous of selling the farm, employed a surveyor to value it, who fixed a

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value upon each particular field, and computed the whole value of the messuage and lands at 6532*l.* 18*s.*; and that on the 9th of *March*, 1789, articles of agreement were signed and sealed between the said *John Beaumont* and *William Norman*, by which, in consideration of 6260*l.* *Beaumont* agreed to convey to *Norman* the said messuage and the 224 acres of land free from incumbrances, the annual payments to the bishop or spiritual court and chief rent, if any, excepted. That a conveyance dated the 7th of *October*, 1789, was accordingly prepared and executed by *Beaumont* and *Norman*; and that it was intended by the parties to the conveyance that the said messuage farm and lands, and no other property, should be conveyed thereby; but that by the mistake of Mr. *Pares* the Solicitor for *Norman*, who prepared the conveyance, a general clause was inserted, by which *Beaumont* was made to convey to *Norman* "all and singular other the closes or grounds inclosed, and other hereditaments in the lordship or liberties of *Sheepshead*, whereof or wherein he the said *John Beaumont*, or any other person or persons in trust for him, had any estate of inheritance in possession reversion remainder or expectancy, except 2 roods of land in *Kirkhill*, and 2 acres in *Borrow's Close*, and the tithes thereof." The bill further stated that *John Beaumont* died in the year 1806, having made no specific devise of the rectory, but having devised all the residue of his real estates to the plaintiff in fee, and that the plaintiff was advised that the legal estate in the rectory and in the tithes of *Charnwood Forest* had passed to *Norman* under the general words inserted by mistake in the conveyance. The bill then charged that the impropriate rectory was never in the contemplation of *Beaumont* or *Norman* as a part of the premises to be conveyed to *Norman*; and that at the time he entered into the contract *Norman* was guided by the valuation, and intended to purchase only the premises comprised therein; that *Norman* never considered himself to be the impropriator of the rectory, and

that *Pares* prepared the conveyance of it from inadvertence and mistake. The bill prayed that the defendant might be declared a trustee for the plaintiff of, the impropriate rectory of *Sheepshead*, and might be decreed to convey the same, and all the great and rectorial tithes of *Charnwood Forest* to the plaintiff, or as he should direct.

The defendant *William Norman Bramley*, the heir at law of the said *William Norman*, by his answer stated, that in the beginning of the year 1789 a treaty was entered into and a bargain concluded between him the defendant as the agent of *Norman*, and an agent on the behalf of the said *John Beaumont*, for the purchase of *Beaumont's* estate in *Sheepshead*, for which at first 7000*l.* was asked, and afterwards 6260*l.* accepted. That in the course of the treaty it was expressly stated by the agent of *Beaumont*, and understood by the defendant, that whatever lands or hereditaments *Beaumont* was entitled to in the lordship or liberties of *Sheepshead* were to be included in the sale; and that at the time when the bargain was concluded a short memorandum of agreement was signed by him the defendant for the purchase of all the said *John Beaumont's* property in *Sheepshead*. The defendant then stated that the contract with *Norman* was afterwards reduced into writing, omitting by mistake any express mention of other hereditaments besides the farm and lands mentioned in the bill; and after admitting the execution of that contract, he stated that it was imperfectly set forth in the bill; and that it contained a proviso, that if the annual payments to the bishop and spiritual court and chief rent should exceed the yearly sum of 1*l.* the same should be allowed for by *Beaumont* his executors or administrators. The defendant admitted the execution of the conveyance set forth in the bill, but stated that it was intended by the parties thereto, that not only the said messuage farm and lands, but all the lands and hereditaments of *Beaumont* at *Sheepshead*, should be conveyed thereby; and that *Pares* inserted the clause men-

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tioned in the bill intentionally, and not by mistake. The defendant further stated, that the draft from which the conveyance was engrossed was prepared by *Pares* on behalf of *Norman*, and perused and corrected by a solicitor of the name of *Dalrymple* on behalf of *Beaumont*, and that at the end of the following clause in the draft, namely "and also all and singular other the closes or grounds inclosed and other hereditaments in the lordship or liberties of *Sheepshead*, whereof or wherein the said *John Beaumont* party hereto, or any person or persons in trust for him, hath or have any estate of inheritance in possession reversion remainder or expectancy," *Dalrymple* added and interlined the following words, namely, "except two roods of land in *Kirkhill*, and two acres in Mr. *Borrow*'s close, and the tithes thereof;" and wrote in the margin of the draft, "not sold to Mr. *Norman*." And that in a letter to *Pares* when he returned the draft, *Dalrymple* stated that the lands on *Kirkhill* and in *Borrow's* close had he believed been sold some years ago to a person who had not yet had a title, and that therefore he had excepted them in the draft out of the general clause of all other lands of *Beaumont* in *Sheepshead*. The defendant insisted upon the exception introduced by *Dalrymple*, as evidence that all the other tithes of the impropriate rectory vested in *Beaumont* were intended to pass by the conveyance. After further stating the defendant's belief that the impropriate rectory was in the contemplation of *Beaumont* and of *Norman* as part of the premises intended to be conveyed to *Norman*, and denying that the valuation mentioned in the bill had ever been shewn to him the defendant, or as he believed to *Norman*, or that *Norman* had been in any manner influenced by it, the answer went on to state that *Beaumont* never in any manner after the execution of the conveyance claimed to be entitled to the impropriate rectory, but that *Norman* considered himself to be the impropriator of the parish, and regularly discharged the ecclesiastical dues to the bishop and arch-

deacon; and that at the time when the conveyance was prepared, it had been communicated to *Pares* both by *Norman*, and by the defendant on his behalf, that all the property of *Beaumont* in *Sheepshead* was at the time of making the bargain understood to be included in the purchase, and that the title of *Beaumont* to the great tithes of the forest of *Charnwood* was as the defendant believed at that time known, not only to *Pares*, but to *Beaumont* and his solicitor. It further appeared by the answer that *Dalrymple*, who had acted in regard to the sale as the agent and solicitor of *Beaumont*, was dead.

On the part of the plaintiff several surveyors were examined, who proved that the tithes of *Charnwood Forest* were not included in the valuation stated to have been made previous to the sale. The agreements executed by the defendant and by *Norman*, and the draft of the latter agreement were also proved. The farm and lands only were mentioned in the agreements. The evidence on the part of the defendant consisted of the letter written by *Dalrymple*, and of the draft of the conveyance, which was interlined in the manner stated in the answer, and which contained a recital, that *Norman* had contracted and agreed with *Beaumont* for the absolute purchase of the messuage or tenement and closes or grounds inclosed and other hereditaments thereinafter mentioned and described, with their appurtenances, and of the freehold and inheritance in fee simple thereof, at or for the price or sum of 6260*l*. Mr. *Pares* was also examined on the part of the defendant to prove the agency of *Dalrymple*.

The cause was heard before the *Vice-Chancellor* on the 15th of *December*, 1818, and an issue was directed to try whether *John Beaumont*, at the time of the execution of the conveyance of the 7th of *October*, 1787, intended to convey the impropriate rectory of *Sheepshead*, and the rectorial tithes of the forest of *Charnwood*.

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From the decree directing the issue the defendant appealed, and the cause now came on upon the appeal.

Mr. *Wetherell*, Mr. *Preston*, and Mr. *Abercrombie*, for the plaintiff,

Contended that the conveyance did not pass the rectory: but the *Lord Chancellor* having observed that the bill was founded upon the fact of the deed having conveyed what it was the intention of the parties not to convey, and that no relief could be had in equity if the rectory was not considered to have passed by the conveyance; that ground was abandoned, and the argument then proceeded.

For the plaintiff.

Admitting that in dry legal construction the rectory did pass, the parties had no intention that it should be conveyed; the treaty previous to the agreement has no relation to it, neither has the valuation nor the agreement. The equitable relief is clear: in this Court an instrument under seal may be reformed even by parol evidence, provided it is sufficiently strong; here the agreement by which the conveyance is sought to be rectified is under seal, equipollent to the deed itself. It will be argued that all the rectory was intended to pass, because payments which are incident to it are cast upon the purchaser: but nothing is more common than to sell part, and to throw upon the part which is sold the burthen which is incident to the whole. In support of the practice of directing an issue to try the intention of the parties upon a bill to rectify a conveyance, the case of *Sanderson* v. *Brown* was cited. (*a*)

(*a*) SANDERSON *v.* BROWN.

The result of this case was thus stated by the *Lord Chancellor* from a note with which he had been furnished:—In the year 1784, Mr. *Hoare* entered into an agreement with the devisees in

Mr. *Heald*, Mr. *Shadwell*, and Mr. *Merivale* for the defendant,

Relied upon the answer uncontradicted by evidence, insisting that there was no mistake in the conveyance, but

trust under the will of a person of the name of *Prisick*, to purchase for Sir *Charles Turner*'s family the tithes of all the lands within the township of *Dighton*. In the month of *November*, 1786, Mr. *Hoare* prepared the conveyance, and in consequence of a confusion between the township of *Dighton*, and the *Dighton* estate which belonged to the family of Sir *Charles Turner*, he included in the conveyance, not only the tithes within the township of *Dighton*, but also the tithes issuing out of a farm which formed part of the *Dighton* estate, but which was in the township of *Brompton*. The devisees in trust under the will of *Prisick* executed the conveyance without discovering the mistake: but they delivered to Mr. *Hoare* the tithes within the township of *Dighton* only, and not the tithes of the farm in *Brompton*. From the year 1786 to 1802 the tithes of *Brompton* were taken by the devisees of *Prisick*, and enjoyed by them, and the tithes within the township of *Dighton* only were taken by Sir *Charles Turner*'s family. In the year 1802 the defendant *Brown*, who had occupied the farm in *Brompton* from the year 1786, and had from that time paid the tithes to the devisees of *Prisick*, purchased the farm from Sir *Charles Turner*, and took a conveyance of the tithes from him. *Brown* having retained the tithes under the conveyance, the devisees of *Prisick* filed a bill against the occupying tenant for an account, and prayed that all proper parties might join in a reconveyance of the tithes within the township of *Brompton*.

The defendant Sir *Charles Turner*, the heir of the Sir *Charles Turner* for whom the property was purchased by Mr. *Hoare*, admitted that the devisees under the will of *Prisick* had enjoyed the tithes in question from 1786 to 1802. And Mr. *Hoare* in his answer stated that he had an apprehension that he was buying all the tithes of the *Dighton* estate. Sir *William Grant* directed an issue to try whether the devisees in trust of *Prisick* intended by the deed of 1786 to pass the tithes of the *Brompton* estate; the devisees of *Prisick* were to be plaintiffs at law, and Mr. *Hoare* was directed to be examined upon the trial of the issue.

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that the mistake was in the agreement; and cited *Burt* v. *Barlow*, (*a*) *Marquis of Townshend* v. *Stangroom*, (*b*) *Lord Irnham* v. *Child*, (*c*) *Henkle* v. *Royal Exchange Insurance Company*, (*d*) *Farewell* v. *Coker*. (*e*)

Mr. *Wetherell*, in reply,

Mentioned the case of *Hippesley* v. *Homer*, (*f*) in which

(*a*) 3 B. C. C. 451.
(*b*) 6 Ves. 328.
(*c*) 1 B. C. C. 92.
(*d*) 1 Ves. 317.
(*e*) 2 Meriv. 353. 2 Jac. and Walk. 192.

(*f*) HIPPESLEY *v.* HOMER.

The following notes of this case, with which the Editors have been favoured by Mr. *Bell*, have been compared with the entries in the register's books.

Elizabeth Ann Hippesley, wife of Sir *John Cox Hippesley*, by her next friend, and the Honourable *William Homer Strangeways*, Plaintiffs,

And

Thomas Strangeways Homer, the said Sir *John Cox Hippesley*, and *John Bishop*, Defendants.

Thomas Homer, by his will dated the 29th of *November*, 1800, devised all his real estates to the defendants Sir *John Cox Hippesley* and *John Bishop*, their heirs and assigns; upon trust in the first place to raise money by sale or mortgage to pay debts and incumbrances. And subject to the payment of such debts and incumbrances, the said testator directed that his said trustees should immediately after his decease stand seized of the devised estates to the use of his son the defendant, *Thomas Strangeways Homer* for life, remainder to trustees to preserve contingent remainders, remainder to the first and other sons of the said *Thomas Strangeways Homer* successively in tail male, remainder to his first and other daughters successively in tail male, remainder to the testator's daughter the plaintiff *Ann Elizabeth Hippesley* for life, remainder to trustees to preserve contingent remainders, remainder to her first and other sons and first and other daughters successively in tail male, remainder to the plaintiff *William Homer Strangeways* for life, with like remainders to his sons and daughters successively, with remainder to the testator's right heirs for ever. No power was given by the will to *Thomas*

an issue was directed to try whether a particular clause formed part of the will of a testator.

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December 13.

The LORD CHANCELLOR

That case of *Sanderson* v. *Brown* is an authority thus

Strangeways Homer to jointure any woman whom he might marry, or to charge portions for children.

On the 15th *January*, 1804, a codicil was executed by the testator, which, after empowering *Thomas Strangeways Homer* to charge the devised estates with a jointure and with portions for children, contained the following devise, "I hereby devise all my said estates devised by my will as aforesaid, from and after the failure of issue male of my daughter now the wife of Sir *John Cox Hippesley*, unto the heirs of my own body, and in default of heirs of my own body, then I devise the same to the use of such persons and for such estates and in the same manner in all respects as I have by my said will devised in remainder for want or in failure of issue male of my said daughter." The codicil also contained provisions for better enabling the trustees to manage the estates and to raise money for the purpose of executing the trusts of the will, and a power of leasing was given to the defendant *Thomas Strangeways Homer*, and the plaintiff *Elizabeth Ann Cox*, when they should respectively be in possession of the devised estates.

The testator died on the 20th of *January* 1804; the bill alleging that the testator executed the codicil upon the representation, and in the belief that it contained nothing but powers to *Thomas Strangeways Homer* to make a jointure and to charge portions for children, prayed, that the said pretended codicil might be set aside and cancelled, and that if necessary an issue might be directed to try the validity thereof.

The defendant *Thomas Strangeways Homer* by his answer admitted, that the codicil contained matter not intended by the testator, and that it was never read or fully explained or understood by him, and that as such it ought to be set aside. The defendants the trustees submitted to act as the Court should direct.

Upon the hearing of the cause on the 12th of *May* 1804, it was ordered that the parties should proceed to a trial at law upon the following issues: 1st, whether *Thomas Homer* did in and by a certain paper writing dated 15th

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far only, that an issue may be directed with a view to correcting a mistake in a deed; I am astonished that Sir *William Grant* should have directed an issue in that case, for although there are to be found in the doctrines of this Court lessons of extreme caution how instruments are corrected, and that the testimony must be clear and irrefragable, it does appear to me, that under the species of

of *January* 1804, purporting to be a codicil to the last will and testament of the said *Thomas Homer*, devise in manner and form following, that is to say, &c. (setting forth the words of the codicil by which the power of jointuring and charging portions was conferred on *Thomas Strangeways Homer*.) 2d., whether the said *Thomas Homer* did by the said codicil devise in manner and form following, that is to say, &c. (setting forth the remainder of the codicil) and the defendant *Homer* was to be plaintiff at law, and the defendants Sir *John Cox Hippesley* and *John Bishop* were to be defendants at law. [Reg. Lib. A. 2. 1803. fol. 1075.]

The cause coming on for further directions on the 17th of *May* 1805; it was declared, that it appears by the finding of the jury that that part of the codicil of the testator whereby he expresses himself as follows, (setting forth that part of the codicil which was the subject of the second issue) does not constitute the will of the testator, and that that part of the codicil of the testator whereby he expresses himself as follows, (setting forth that part of the codicil which was the subject of the first issue) does constitute the will of the said testator, and that one part of the said codicil constituting, and another part thereof not constituting, the will of the said testator, this Court cannot order the same to be delivered up: but it being consonant to equity that the parties should stand in such a situation as if the said codicil could be delivered up, this Court doth declare, that so much of the said codicil as does not constitute the will of the said testator is void, and that the devise to the heirs of the body of the said testator *Thomas Homer* contained in his said codicil ought not to take effect, and doth decree the same accordingly; and doth also decree, that the said defendant *Thomas Strangeways Homer* be restrained from setting up any title at law to the several estates so devised to the heirs of the body of the said testator contained in his said codicil, and in question in this cause. [Reg. lib. A. 2. 1804. fol. 1237.]

enjoyment in that case, I should have had no difficulty in the world in saying, that the mistake was most clearly made out.

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This is a bill filed in *February* 1812, to rectify the effect of a conveyance made in 1789, in a case where the question is upon the intention of the parties to the conveyance: Both those parties have been long dead, it is impossible therefore to obtain any evidence from either of them; the agent of one of the parties is also dead, so that there is no evidence from him except what may be collected from papers which were in his possession. Mr. *Pares* the agent of the other party is living, and is examined on the part of the defendant: but although allegations are made in the bill with respect to acts done by him, he is not examined in chief, or even cross-examined on the part of the plaintiff.

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In cases of this nature great weight must be given to what is reasonably and properly sworn on the part of a defendant, because it must be a very strong case that would even in a recent transaction operate to overturn or vary a solemn instrument, and after the lapse of so long a time it must be a case that leaves no reasonable doubt, a case that must satisfy the conscience of the Court, or of a jury, if it goes to a jury, but it is only after great consideration that such a case should be sent to a jury. Upon the part of the agreement as to the allowance if the payments should exceed 1*l.*, observations may be made both ways. It may be said that the rector, selling the allotments, parcel of the rectory, meant to throw upon the purchaser the burthen of discharging the rest of the rectory from any such payments; or, on the other hand, it may be said, that the party was selling the rectory, and that the meaning of the transaction was, that if the

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payments exceeded 1*l.* the purchaser should have an allowance for them; at the same time I cannot but remark, that if the vendor intended to continue himself as impropriator, it is extraordinary that care was not taken in the conveyance, that if thereafter the payments were to be made by the individual who was purchasing the farm, those payments should be so made as not to give colour to the idea that the purchaser was the impropriator. The receipts do not amount to much evidence, they are receipts given on behalf of the impropriator without stating who the impropriator was: but still they give rise to this observation, that the individual who took the receipts was preserving evidence that he was the individual who paid the money for which such receipts were given, and the person who is supposed to have retained in himself the tithes which might become due from the chase, was preserving no evidence that he was the impropriator; that comes to be material for this reason, that his not having so done is to a certain extent evidence that he did not consider himself at the time as being the impropriator.

If the contract had been for the purchase of the farm lands and other hereditaments, and the conveyance had been made without any express mention of other hereditaments, it seems to me upon the principles laid down in that case of *Stangroom* v. Marquis of *Townshend*, that if such a case was clearly made out the Court would enlarge the subject of the conveyance, and admitting that if it had been shewn on the part of *Bramley* that there had been an omission in the conveyance, it might have been rectified, *pari ratione* if more has been conveyed than was intended the Court may deduct the excess: but then it must be remembered that if the former is a case of great difficulty, the latter is also a case of great difficulty, and the Court must in each case proceed with the greatest possible caution. There is no doubt on the one hand, that if an instrument affects by its recital to carry into execution a certain

Where a deed affects by its recital to carry an agreement into execution and goes beyond the agreement the Court will rectify.

agreement and goes beyond that agreement, the Court will rectify it, because then it has clear evidence on the face of the instrument itself, that the instrument operates beyond its intended operation; on the other hand it is quite clear, that parties may enter into articles of agreement, and the terms of the agreement may be extended by parol, provided the conveyance itself is written evidence that there has been such an extension of the parol agreement. If there is nothing but parol agreement additional to the written agreement, the proof of that parol agreement may perhaps be a ground in this Court for refusing to execute the written agreement: but the case is quite different where the conveyance recites what is the agreement which the parties intend to carry into effect.

It must be admitted that the valuation relates to the farm and lands only, and that the original intention of the vendor was to sell the farm and lands only. The case then stands thus,—this bill is filed in 1812 to cut down a conveyance, which does not in its operative part go beyond what it was the intention of the parties by the recital to do, and does not refer either expressly or otherwise to any articles of agreement, and the question is, whether with respect to the addition of such a property as this, which was not valuable at the time of the contract, or likely to become so, having regard to what is stated in the answer, and to that security to title which ought never to be lost sight of, the Court can take upon itself to say that it will cut down the acknowledged effect of a conveyance, after the death of both the parties to the agreement, and after the death of the agent of one of them, and when it appears that the plaintiff does not think fit to address one single question to the agent of the other party in support of what is alleged about him in the bill.

The recital in the deed has no reference to any written agreement; it does not impart that the parties were then

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confining themselves to the property contained in the written agreement, it is in itself evidence of a contract which goes beyond what the written agreement had specified. If the parties had meant only to carry into execution the written articles of agreement they would have mentioned them. I cannot get rid of the word "tithes" added to the exception of the particular closes. If no tithes were intended to be sold what occasion was there to insert that exception? The question here is whether the deed does not recite a contract which actually took place, to the effect that *Norman* should have all the property: if so, that was a new contract, and even if not entered into till the moment of executing the deed would have the effect of excluding all preceding contracts, as being a declaration in writing of what was the contract at that time meant to be entered into.

Reason for using caution in cutting down the effect of a conveyance.

One great reason for using extreme caution in cutting down the effect of a conveyance is, that the Court ought to consider what would have been done, if previous to the execution of the conveyance the question had been put to the Court, what conveyance should be made in performance of the agreement. Suppose in this case a bill had been filed in the year 1789, praying that these articles of agreement might be specifically performed, surely it would have been competent to the purchaser to say, Do not enforce against me a specific performance of these articles, for since the articles have been entered into a more extended agreement has been made, which renders it unconscionable for the Court to decree a specific performance of the articles. Suppose this rectory was to be restored, and the value of this land has fallen from 6000*l.* to 3000*l.*, would not the purchaser have a right to say, the agreement, as represented by the vendor, could not have been enforced against me under the circumstances that obtained before the conveyance was executed, and if the vendor is to take back that which he represents he did not mean to convey,

on the other hand I must be put in the situation in which I could have said, unless all that I can prove to have been made the subject of the agreement is conveyed to me I mean to take nothing.

In that case of *Stangroom* v. The Marquis of *Townshend* I collected the effect of all the authorities with respect to reforming instruments, where it is stated that they have been carried too far or not far enough by mistake. Upon that occasion I looked very accurately through all the cases, and to the principles there laid down I think proper to adhere, and adhering to those principles I do not think that in a case like the present, where the bill is filed above twenty years after the conveyance was made, where there is an agreement recited in the conveyance itself not referring to the other written articles of agreement, where the parties to the conveyance have long been dead, and where it appears on the face of the conveyance, that to a certain extent at least the agent of the grantor acknowledged the extended agreement, and where the agent of the grantee, the only person alive who could give a personal account of the transaction is not examined by the plaintiff, whose business it is to make out the case of surprize and mistake, I can say that there is that species of evidence which will enable the Court to make the declaration which has been prayed by this bill. Whether the vendor in this case has or not mistaken his purpose is a question that I think under these circumstances I cannot leave to a jury, I do not mean to say that there may not be cases which should go to a jury, but I am sure that if the principles laid down in the case of The Marquis of *Townshend* v. *Stangroom* are the principles upon which the Court is to act, it must be extremely cautious how it sends such cases to a jury. Upon the principles of the Court that appears to me a very dangerous way of proceeding, for undoubtedly more consideration has been given to this case here, than could have been given by any jury. I think that it is the duty

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of the Court in each case most accurately to sift the circumstances, and to see what are the consequences resulting from those circumstances.

Bill dismissed.

Dec. 20.

Ex parte MURRAY.

Solicitor who had become incapable of practising (without being re-admitted) in consequence of having neglected to obtain a certificate for one whole year, ordered to be re-admitted on payment of a small fine only, without the arrears of duty.

THIS was an application on behalf of a solicitor, who having taken out a certificate which expired in *November* 1821, and having omitted to take out any certificate since that period, had under the provisions of the statute 37 *Geo.* 3. *c.* 90 *s.* 31. become incapable of practising without being re-admitted; (*a*) that he might be re-admitted a solicitor of the Court, on payment of a fine of 6*s.* 8*d.* only without any arrears of duty.

(*a*) By the statute 37 *Geo.* 3. *c.* 90. *s.* 31. it is enacted, that every person admitted sworn enrolled or registered in any of the Courts therein mentioned, who from and after the 1st day of *November*, 1797, shall neglect to obtain his certificate thereof in the manner therein directed for the space of one whole year, shall from thenceforth be incapable of practising in his own name, or in the name of any other person, in any of the said Courts by virtue of such admission entry enrolment or register, and the admission entry enrolment or register of such person in any of the said Courts shall be from thenceforth null and void; provided always that nothing hereinbefore contained shall be construed to prevent any of the said Courts from re-admitting any such person, on payment to the commissioners of the duty accrued since the expiration of the last certificate obtained by such person, and such further sum of money by way of penalty as the said Court shall think fit to order and direct.

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The affidavit of the solicitor stated, that he had not practised as an attorney or solicitor in this or any other of the Courts of law or equity since the expiration of his last certificate, and that he had been informed at the office of the Master of the Court of King's Bench, that it is the practice of that Court to grant re-admissions without compelling payment of the arrears of duty, provided the application for re-admission is accompanied by an affidavit, stating that the party applying has not practised in any of the said Courts since the expiration of his last certificate.

Mr. *Beames* in support of the motion mentioned the case of *Ex parte Adey*. (*b*)

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Ordered that the applicant should be re-admitted a solicitor of the Court, if his Honour the Master of the Rolls should so please, upon payment of such a fine as his Honour should think proper.

(*b*) *Ex parte* ADEY, *Lord Chancellor*, 16th *November* 1816.

Mr. *Adey* having been admitted in all the Courts at *Westminster* in the month of *February* 1814, and not having practised or taken out a certificate from the time of his admission, applied to be re-admitted a solicitor of the Court of Chancery on payment of a small fine only without any arrears of duty; The *Lord Chancellor* ordered that he should be re-admitted a solicitor of the Court, if his Honour the Master of the Rolls should so please, upon payment of 6*s*. 8*d*. as a fine on such re-admission. [Reg. Lib. A. 1816. fol. 46.]

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January 21.

ATTORNEY-GENERAL *v.* CLEMENTS.

The jurisdiction to give effect to an award, confirmed by the decree of the Court in the case of a charity, is doubtful: but the renewal of a lease upon the terms of the award, having been twice directed by the Court, was again enforced.

THIS was a petition presented by the president and governors of the *Bath Infirmary;* the infirmary is built upon ground held under an hospital at *Bath* called *St. John's Hospital,* upon a lease for three lives renewable on the dropping of each life upon payment of a fine.

The petition stated, that by a decree award and final judgment made pronounced and signed on the 11th of *February* 1716, by Sir *John Trevor* the then Master of the Rolls, after reciting that in or about *Hilary* term 1711, a bill was exhibited in this Court by her then Majesty's Attorney-General at the relation of the then master and cobrethren and sisters of *St. John's Hospital* against the corporation of *Bath,* and that the scope of the said bill was, to have a discovery of the original foundation and settlement of the said hospital of *St. John,* and of the charities thereto belonging, and of the annual value of the charity lands and possessions, and to have such rules and orders made for the application of the charity estates, and for the government of the charity for the future, as should be thought necessary and convenient; and that the defendants having put in their answers, after examination of witnesses the cause came on to be heard before the said Sir *J. Trevor* on the 26th of *November* 1713; and that he had heard the proofs taken in the said causes, and what was alleged by counsel on all sides; and after further reciting that all parties had by consent submitted all matters in question in the said cause to the award final judgment and determination of him the said Sir *John Trevor,* and had agreed that such award or determination as he should make therein should (by consent of all the said

parties) be confirmed and established by the decree of the Court of Chancery, and that in order thereto the master cobrethren and sisters of the said hospital had executed an instrument under their common seal to signify their consent to such submission; he the said Sir *John Trevor* for settling all disputes that had arisen or should arise touching or concerning the management of the said hospital, and of the possessions and revenues thereof for the then present and future time, and for the better and more orderly government of the said hospital, did order judge and determine (amongst other things) that the master of the hospital, with the consent of the brethren and sisters for the time being, might under their common seal from time to time, as any of the leases should be surrendered or determined upon the death or deaths of any life or lives, or upon the changing of any life or lives, grant new leases not exceeding three lives at the most, and to be nominated by the several and respective tenants, reserving the same rents as were thereby directed to be respectively reserved, and that the fine to be taken on renewing such lease should not exceed one year's value for a life according to a particular thereto annexed, adding interest for the time such renewal should be neglected by the tenant, to be computed from the end of six calendar months after the former life determined; and that the rents or fines should not be increased without the leave of the Court.

The petition then stated, that at the time of making the said decree or award part of the ground upon which the infirmary now stands, was together with another small tenement held by a tenant under the hospital at the yearly rent of 25*l.*, upon a lease for three lives renewable on the dropping of each life, and that 36*l.* was by the particular annexed to the said decree or award stated to be the annual value of the premises comprised in the aforesaid lease, and that the same premises were held by the said tenant and those claiming under him at the same yearly

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rent, and paying the said yearly value of 36*l.* upon the renewal of each life, till the year 1737.

The petition further stated that in the year 1737 the piece of ground comprised in the aforesaid lease was conveyed to trustees for the purpose of building the infirmary, and that in the year 1738 the infirmary was built thereon, and upon another small piece of ground which then belonged to the corporation of *Bath*, but which was conveyed to the hospital upon an exchange with the corporation in the year 1805. That in the year 1736 a fine of 36*l.* was paid for a renewal of one life, that in 1743 30*l.* only was paid for the like renewal, but that on four subsequent renewals, which had taken place between the years 1750 and 1806, fines of 36*l.* had been regularly paid.

The petition then stated, that upon the dropping of one of the lives in the lease of 1806, the sum of 250*l.* had been demanded by the hospital as the fine for a renewal, and prayed that the master cobrethren and sisters of *St. John's Hospital* might be ordered to accept of a surrender of the lease granted in 1806, and to grant a new lease of the same premises for the lives of the two remaining *cestuis que vie* and of some other person to be named on behalf of the petitioners, upon payment of the sum of 36*l.*, or that it might be referred to one of the masters of the Court to enquire and ascertain what fine ought to be required and paid for the renewal of the said lease pursuant to the said award or decree.

The petition having been argued on a former day, two instances were referred to, one in 1738, and the other in 1753, in which Lord *Hardwicke* had acted upon the award upon a petition similar to the present. But the *Lord Chancellor* then expressed some doubt as to the jurisdiction, and desired that the petition should be mentioned again upon that point.

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Mr. *Wingfield* and Mr. *Wray* now appeared for the Hospital of *St. John* to oppose the petition, and contended

That the renewal of the lease could not be compelled consistently with the principles adopted by the Court in matters of charity. That a lease executed by trustees of a charity without the order of the Court, containing such provisions as were to be found in the award, could not have been supported: and that the decree of the Court did not vary the case, as it was made by the consent of the trustees, who had no power to bind the charity.

The *Attorney-General* in support of the petition.

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I still entertain great doubts whether the Court has complete jurisdiction in this case. It appears that in 1711 an information was filed at the instance of the Hospital of *St. John*, and according to the habit prevailing at that time, instead of going on in the Court of Chancery with the information, they referred all the matters in dispute to Sir *J. Trevor* who was then Master of the Rolls, and he made an award which was afterwards confirmed by the Court of Chancery.

Formerly this Court was more in the habit of giving effect to awards than at this day it is accustomed to do. Awards relating to commons are a familiar instance. So where sums of money and land have been awarded in lieu of tithes: Lord *Northington* set that practice aside, (*a*) but whether in cases of charity the Court would go so far as Lord *Northington* did admits of great doubt, because unquestionably the Court has always exercised very large powers in matters of charity.

(*a*) *Attorney-General* v. *Cholmley*, 2 Eden's C. C. 304. Ambler 510.

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With respect to the present charity, in 1738 and 1753 Lord *Hardwicke* assumed the jurisdiction upon petition then presented to him. I cannot think that on either occasion he could have done so without consideration. It is perhaps a misfortune that the jurisdiction was ever assumed: but my predecessors have acted upon it, and it is perfectly clear that this property has been enjoyed under this award ever since it was made. Notwithstanding any doubts therefore which I may entertain, if this award is to be disturbed, it must be disturbed by the House of Lords.

The funds of the *Bath* Hospital not being in a flourishing state is not a sufficient objection to the application of the other charity. I think the hospital ought to pay an increased fine according to the increased value of the land, which the Court has the power of directing; and if you differ as to the amount, there should be a reference to the Master.

A reference was accordingly agreed upon to the Master to ascertain the fine.

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1822, *Dec.* 18.
1823, *Jan.* 22.

RICHARD BOLT made his will, dated the 20th of *September* 1813, in the following words: "I *Richard Bolt* do make this my last will and testament as follows, first I annul all former wills, &c.; and after my debts and funeral expenses are paid or settled to be paid to those persons I will as rewards for long services. Secondly, I will and bequeath unto my dear wife *Esther Bolt* the annual interest of my property in the funds at my decease in the little I leave in the 3 *per Cents.* reduced, 3 *per Cents.* consols. and 4 *per Cents.* ditto, not any to be sold out, as I may will it after her decease to her sister *Rachael Beaver*, and my wife's nephew *Richard Beaver* who I leave an executor to this my will. Also I will and bequeath unto my dear wife the annual profits of shop trade, the stock not to be lessened, to be hers for life, after all expenses paid; the rent to be paid in her name for life, and her name over the door singly—*Bolt;* all the necessary articles for house and people not to be sold, to be managed by *Richard Beaver* the executor, and *Rachael Beaver* his aunt, with the approbation of my wife, if living. Also I will that my wife is under conditions and stipulations for performing what I leave to any one I mention in this will, whether in a sum down or annual stipend for life or for long services, and to be paid as I will and bequeath it from the shop trade or the funds as I mention it to pay from and after my wife's I will and bequeath *Rachael Beaver* and *Richard Beaver* equal shares in the profits of business for life, the survivor to have the whole on condition of observing the will and paying donations that I will and bequeath at any period, I will it as they are the particular heirs after my wife, the stock of shop not to be divided, as I only will the profits or interest to the survivor of the three persons already named. Also I will *Rachael*

Executor, taking a contingent reversionary interest under the will, not precluded from giving evidence of the intention that he should have the residue beneficially, nothing upon the face of the will indicating that he was to take the office merely.

Under the effect of the will and the evidence the executor was declared to be entitled beneficially. Whether the contingent reversionary interest would have had the effect of rendering him a trustee for the next of kin. *Quære.*

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Beaver my wife's shopwoman and *Richard Beaver* in the same situation they are to have all the privilege of living in sickness or health, allowing Mrs. *Bolt* the interest of what little property they have, I hope either will leave my wife in case of vicissitude and losses, and she has been as free to give when I have an act of kindness I wished to perform."

The testator died on the 20th of *August* 1817, and the executor *Richard Beaver* obtained probate of his will.

The bill was filed by *Daniel Lynn* and others alleging themselves to be the next of kin of the testator, against *Richard Beaver Esther Bolt* and *Rachael Beaver*; contending that the plaintiffs had an interest in the testator's personal estate, and praying an account and a distribution of the residue.

The defendant *Richard Beaver* as executor claimed the residue for his own benefit.

Upon the hearing of the cause before the *Vice-Chancellor*, on the 28th of *February* 1821, it was referred to the Master to enquire who were the next of kin of the testator. The Master by his report, dated the 18th of *December* 1821, stated that *Thomas Forster*, who was not a party to the cause, was the only next of kin of the testator. After the Master had made his report *Thomas Forster* filed a bill and died, and exceptions having been taken to the report, the *Vice-Chancellor*, upon hearing the exceptions, directed an issue to try whether *Lynn* and others the plaintiffs in the first cause were the next of kin of the testator; and ordered that the personal representatives of *Forster* should be at liberty to attend the trial, and join in the defence. The plaintiffs in equity were to be plaintiffs at law, and the defendant *Richard Beaver* the executor was to be defendant at law.

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From the decree directing the issue the defendant *Richard Beaver* appealed, and moved that the trial of the issue might be stayed till the hearing of the appeal. On the motion being made it was arranged, by the consent of the plaintiffs and defendants and of the representatives of *Forster*, that the cause should be considered as coming on to be heard upon the construction of the testator's will, and upon the question whether the executor was entitled to the residuary personal estate for his own use, or was a trustee for the next of kin.

Mr. *Sugden*, Mr. *Joseph Martin*, and Mr. *Lynch*, for the plaintiffs.

Mr. *Hart* and Mr. *Barber* for the representatives of *Forster*.

Mr. *Shadwell* for *Rachael Beaver*.

Mr. *Pepys* for *Esther Bolt*.

Mr. *Horne* and Mr. *Knight* for *Richard Beaver*.

The defendant *Richard Beaver* went into parol evidence, and proved declarations by the testator that he intended his executor to take the residue. The plaintiffs' counsel objected to the evidence being admitted.

For the plaintiffs.

There is no allegation in the answer that the executor intended to adduce parol evidence in support of his legal title. Had the plaintiffs been apprized that these declarations were intended to be proved, they might have cross-examined the defendant's witnesses, and produced evidence of declarations by the testator of a contrary tendency.

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An executor taking a partial interest cannot enter into parol evidence to shew that he is entitled to the general residue.

The LORD CHANCELLOR.

Claiming the residue as executor, is sufficient to let in parol evidence in support of the legal title, without alleging a title by the effect of the parol evidence.

Considering the rule to be settled that an executor is permitted to give parol evidence in support of his legal title, if the answer insists that the defendant is entitled as executor, no allegation is necessary to put in issue that he is entitled by the effect of parol evidence, that being included in the allegation that he is entitled as executor. The evidence was directed to be read subject to the question of its being admissible.

The cause then proceeded: for the plaintiff it was contended that the gift of a reversionary interest excludes an executor from the residue. *Seley* v. *Wood.* (*a*)

For the defendant *Richard Beaver* the executor.

There is nothing in this will to controul the legal right of the executor, the benefits given to him by the will are given only for the purpose of letting in exceptions in favour of others; where a legacy is given by way of exception out of the general gift to another, or for the purpose of letting in an exception in favour of others, the Court will not infer an intention on the part of the testator to exclude the executor from the surplus. Lady *Granville* v. Duchess of *Beaufort,* (*b*) *Newstead* v. *Johnston,* (*c*) *Griffith* v. *Rogers,* (*d*) *Clennell* v. *Lewthwaite.* (*e*)

(*a*) 10 Ves. 71.
(*b*) 1 P. Williams 114.
(*c*) 2 Atk. 45.
(*d*) Prec. Ch. 231.
(*e*) 2 Ves. jun. 465, 644.

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I do not trouble myself with the question, whether any person looking at this will from beginning to end would have considered it to be a finished will, because with respect to wills of personalty, after probate has been granted by the ecclesiastical court, this Court is bound by the judgment, and has no jurisdiction to try whether the will is complete or not.

After reading the will the *Lord Chancellor* observed upon the clause by which the testator bequeathed to his wife the annual interest of his property in the funds,—"Not any to be sold out, as I may will it after her decease;" that although the word "may" seemed to import an intention on the part of the testator to do something in future, and not to make a present bequest, yet that if it was necessary to decide the question, the clause would in all probability be held to amount to a present bequest upon the construction of the whole will.

Bequest in terms importing an intention not to make an immediate disposition, may upon the construction of the whole will amount to a present bequest.

His Lordship then proceeded,—Taking it for granted then that this is a complete testamentary instrument, the effect of the whole is, to give the annual profits of the funded property and of the stock in trade to the wife for life, and after her decease to leave the profits of the business to *Rachael Beaver* and *Richard Beaver*, with such interest to the survivor as he or she may take under the words of the will. It is observable that the interest here given to the executor is a contingent reversionary interest, for if he should die in the lifetime of the wife, he could take no share in the profits of the trade. It appears too in evidence, that the testator carried on business for forty years in *Sidney's Alley*, not indeed in his own person, for his wife, his wife's sister, and her nephew the executor, conducted it for him; that he considered himself under great obligations to these three persons, and that he thought

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that he had no relations. These are circumstances which must be taken into consideration, where the question is, what the testator meant when he appointed this man his executor, whether he intended him only to take the office, or to have a beneficial interest in all the property undisposed of: but at the same time it would be difficult to say, that the trust raised by the Court in such cases should be put an end to, upon the effect of evidence going no further than that.

The motives which might influence the testator in favour of the executor are to be considered in determining the question, whether the executor takes the residue beneficially.

It is not necessary to cite authorities in order to prove the principles upon which the Court proceeds in cases of this nature. There is no doubt that where upon the face of a will it appears that the executor was intended to take the office only, where the testator has raised a trust which fails of being carried into effect, or where he has clearly intended to create a particular trust, which he has failed in doing, the next of kin will take as against the executor. On the other hand it is equally clear, that if the case be a case of a mere legacy given to an executor, where the presumption of law is to be acted upon that the testator could not mean to give all and part, a presumption, which, whether reasonable or not, the Court is bound to act upon, as the doctrine has been so long laid down, The executor may rebut the presumption by parol evidence; always having regard to the nature of the evidence, to declarations which were made, as in this case for instance, before the testator made his will, at the time of making his will, and after he had made his will; and in giving effect to all the declarations, having regard to the circumstances under which they were made.

There is a circumstance in this case, which I have not been able to find in any other case, that the bequest which raises the presumption against the executor, is a bequest not simply of a reversionary interest, but of a contingent reversionary interest; observing that it was taken for

granted at the bar, that the bequest of a reversionary interest would exclude an executor from the residue, I asked whether there were any cases on the subject; I have been referred only to the case of *Seley* v. *Wood* decided by Sir *William Grant*, a Judge for whom I must always feel the highest respect. Upon that case I can only say, that it is singular in its circumstances, and I think I may add singular in its decision. I do not intend by any means to say that the decision may not be right: but if no more is to be found on the subject of reversionary interests, and particularly of contingent reversionary interests, that is a case which I should find some difficulty in following as an authority in the present instance.

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Taking it for granted however that this contingent reversionary interest would exclude the executor, there is nothing upon the face of this will to shew that the executor was intended to take the office merely, all the cases have established that under such circumstances parol evidence is admissible: the question therefore is reduced to this, whether, supposing this contingent reversionary interest to be a good gift to bar the executor, I can say that the evidence is sufficient to rebut the presumption. The widow of the testator swears to what passed between her and the testator after making the will; that the testator holding the will in his hand, stated what in his judgment was its effect; not indeed with any great accuracy, for to do justice to the testator it was out of the power of any man living or dead to state accurately what was the effect of the will, but on one point he was quite distinct, that he intended his executor to take his property. I am therefore of opinion upon the whole, that this is a case in which the next of kin cannot raise the trust; and that the executor takes what is undisposed of by the will. On account of the great difficulty of construing this will, I think the fair thing is that the costs of all parties should be paid out of the estate.

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The following decree was made:—

His Lordship doth declare, that under the effect of the will of the testator *Richard Bolt*, and the evidence taken in this cause, the defendant *Richard Beaver* is not a trustee for the said testator's next of kin of the clear residue of his personal estate: but the said defendant, as executor of the said testator, is entitled to retain for his own absolute use and benefit the said clear residue, but subject to the payment thereout of the costs hereinafter directed.

And by consent it is ordered to be referred to the Master to tax the costs of the plaintiffs and *Rachael Beaver* of this suit, and also the costs of the said *Thomas Forster* deceased, and of the representatives of the said *Thomas Forster*, in the cause of *Forster* v. *Beaver*, and of the proceedings in the said Master's office in this cause under the order of the 28th day of *February* 1821. And it is ordered that the said defendant *Richard Beaver* do pay such costs when taxed out of the personal estate of the said testator; and after providing for the return of the deposit, it is ordered that the plaintiff's bill do stand dismissed out of this Court.

January 22, 23.

WILLIAMS *v.* ATTENBOROUGH.

The rules which regulate the practice of opening biddings upon a sale of landed estate, do not apply when a colliery is the subject of sale.

Upon an offer to give 10,000*l.* for a colliery, sold for 8850*l.*, a motion to open the biddings was refused.

HENRY ATTENBOROUGH having devised his real and personal estate to trustees, upon trust to sell, and to stand possessed of the monies to arise from the sale upon trusts for the benefit of his children, this suit was

instituted for the purpose of having the property sold under the directions of the Court.

By an order, dated the 4th of *December* 1821, the property was directed to be sold, and an agent for the parties interested was to be at liberty to make one bidding for each lot. The reserved bidding was to be made upon paper, to be delivered under cover to the person appointed to sell the estates, previous to the same being put up to sale, and in case no higher price was bid than the sum mentioned in the paper, it was to be declared that the lot was bought in.

One of the lots, consisting of a colliery and other property, having been bought in under this order, by a decree in the cause, dated the 25th of *June* 1822, a resale was directed, and the agent for the parties interested was empowered to bid as often as he should think proper for each lot to be put up upon the resale.

On the 27th of *July* 1822 the colliery was accordingly put up to sale in a separate lot. Upon that occasion an agent of the parties interested attended at the sale, and a person of the name of *Bourne* was declared the purchaser of the lot, at the sum of 8850*l.*

The confirmation of the purchase having been accidentally delayed, a motion was made to open the biddings on behalf of *Syson*, a person who turned out to be a fictitious bidder, being a day-labourer in the service of one of the parties in the cause; that motion was refused: but a person of the name of *Thorn* having offered to give 10,000*l.* for the lot, the *Vice-Chancellor* directed the biddings to be opened upon his application.

It was now moved on the part of Mr. *Bourne*, that the

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order of the *Vice-Chancellor*, by which the biddings were directed to be opened, might be discharged.

The affidavits in support of the motion rendered it doubtful whether *Thorn* was a *bona fide* bidder. From the time of the second sale the colliery had been worked by *Bourne*, at a considerable expense, under the superintendence of the devisees in trust of *Attenborough*; and it was represented by the persons beneficially interested, that the management had been very disadvantageous.

Mr. *Agar* and Mr. *Horne* for Mr. *Bourne*.

Thorn is merely an agent for the parties interested in the estate. In favour of the parties interested the biddings cannot be opened, their agent having been present at the sale. In the ordinary case of opening biddings, the property remains in the same state in which it was at the time of the sale: but Mr. *Bourne* having embarked his capital in the management of this concern, is at least entitled to be indemnified for the expense he has incurred.

Mr. *Shadwell* and Mr. *Pemberton* for Mr. *Thorn*.

Mr. *Rose* for the devisees in trust of *Henry Attenborough*.

Mr. *Heald* for the defendants beneficially interested in the produce of the sale.

Mr. *Treslove* for the plaintiffs.

The parties interested in the sale have a right to open the biddings; *Hooper* v. *Goodwin*. (*a*) Whether they

(*a*) Coop. Ch. Cases 95.

apply in their own name, or in the name of another person, can make no difference.

The LORD CHANCELLOR.

This being a motion to open the biddings, Mr. *Bourne* must be considered as the person at present entitled to the purchase; considering him therefore as the purchaser, the true question is, whether having regard to the nature of the property, and the manner in which it has been treated in the Master's office, together with all the circumstances of the case, the biddings ought to be opened; I say, having regard to the nature of the property, because it has been solemnly determined in this Court, that the sale of a colliery is not like the sale of a landed estate, and that a purchaser under the decree of this Court, is not entitled to call for an account of the profits of a colliery from any particular quarter day, as upon the sale of a landed estate he is entitled to do. (*a*) Collieries and landed estates are quite different in the contemplation of this Court; a colliery being always considered as a trade, the profits accruing from day to day as in all trading concerns. There are decisions of Lord *Hardwicke's* to that effect, where he held that a bill would lie for an account of the profits of a colliery, although for an account of the rents and profits of real estate no bill could be maintained. With reference to opening the biddings, the nature of the property forms a very material consideration. Land generally speaking keeps pretty nearly to the same value, although there may indeed be accidental changes in the value of land from temporary causes: but collieries are liable not only to fluctuations in value, but to destruction; they are like land in a country liable to earthquakes. The case of *Wren* v. *Kirton* is a remarkable illustration of the principle which ought to govern the resale of collieries. On

(*a*) *Wren* v. *Kirton*, 8 Ves. 502.

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the first sale in that case a colliery was sold for 23,000*l.*, the Court opened the biddings, as it turned out, for a fictitious bidder. The consequence was, the property fell first to 12,000*l.*, then to 6000*l.*, and although it was ultimately sold for 15,000*l.*, there might have been a loss of the difference between 23,000*l.* and 6000*l.*, and there was an actual loss of the difference between 23,000*l.* and 15,000*l.* Such is the species of this property, that it is almost impossible for the Court to model the security, to be given by the person applying to open the bi dings, in such a way as to avoid the possibility of loss; a deposit of 10*l.* or 20*l. per cent.* cannot be sufficient, for in many cases it will evidently be better to forfeit the deposit, than to take the property, better to forfeit 1000*l.*, than to take a property which may sink in the proportion stated from the case of *Wren* v. *Kirton*. Again, upon a resale of the property, the purchaser may be tired of his bargain before he has completed his purchase, and although it is true that the Court may compel the final bidder to pay the money, the process is such, that in a great many cases it is more for the interest of the vendors to abandon the bargain, than to put in force the process of the Court. From these considerations it has always appeared to me, that where the subject of a sale is a colliery, a trade of so very hazardous a nature, in which there is always such a vast deal of speculation, and such a great number of speculators, you cannot apply the same rules, which are applied to purchasers of landed estates. The property is liable to such variations in value in very short intervals, the blasting of a mine, or any other accident, even a change in the markets, or, to take an instance at the present moment, the stoppage of a navigation by frost, may make such a difference in the course of a week, that in all these cases it is the duty of the Court to consider, as the *Vice-Chancellor* appears to have done very fully and properly in *Syson's* case, not what the particular interest of the suitors in any particular cause would require for their advantage, but what the

general principle ought to be, with reference to the general benefit of the general suitors of the Court.

When *Thorn's* case came on before the *Vice-Chancellor*, he seems to have lost sight of the principle which he had laid down in *Syson's* case, and to have thought that *Thorn*, if he was a *bona fide* bidder, had some sort of right to open the biddings. Now no one can be said to have any right to open the biddings, since it is always in the discretion of the Court to grant the application or refuse it. The question is, not whether the person applying is a *bona fide* bidder, but whether regard being had to the nature of the property, the circumstances of the case, and the general interest of the suitors of this Court, not the interest of purchasers in the Master's office, so much advantage is held out as to induce the Court to open the biddings. During a period of nearly half a century which I have passed in this Court, and in which Lord *Apsley*, Lord *Thurlow*, the Lords Commissioners, with Lord *Loughborough* at their head, then Lord *Loughborough* as chancellor, and after him the Lords Commissioners, with Lord *C. B. Eyre* at their head, have presided here, I have heard one and all of them lament, that the practice of opening biddings was ever introduced. I confess that I have great doubts myself upon the subject: but after a practice so long established it is not for me to disturb it. This method however of authorising parties to bid at the sale is quite modern, and requires a great deal of consideration, as there can be little doubt that it has the effect of damping the sale; so highly did Lord *Kenyon* disapprove of parties interested in the sale bidding by themselves or their agents, that if there was a suspicion that any agent on the part of the vendor had been bidding in the Master's office, he would not enforce the execution of the contract.

There is another view of this case taken by Mr. *Agar* which is entitled to a great deal of weight, how far these

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parties may be considered by their agents to have been present at the sale. The Court indeed has not adopted it as a universal rule, that the biddings shall not be opened in favour of parties who are present at the sale: but that circumstance undoubtedly furnishes a very strong objection to the interference of the Court. The case of *Goodwin* v. *Hooper*, in which a residuary legatee was allowed to open the biddings, has been cited in argument. There can be no doubt at this time of day that a residuary legatee may become the purchaser of an estate sold in the Master's office, so may a tenant for life, or the owner of a reversionary interest: but if the matter were *res integra* I should have great doubts whether they ought to be allowed to do so; they thereby frequently contrive to buy the fee simple at a rate at which no one else could get it; from their knowledge of the property they stand nearly in the same situation as trustees, who are excluded on this ground from bidding for trust property.

The rule is not universal that biddings shall not be opened in favour of parties present at the sale.

Residuary legatee, tenant for life, or reversioner, may become the purchaser of an estate sold in the Master's office.

In this case upon the second sale Mr. *Bourne* became the purchaser; and as the purchase could not be confirmed for a considerable time, it became absolutely necessary to take into consideration who should have the intermediate management. It was finally agreed that Mr. *Bourne* should work the colliery under the superintendence of the trustees; it would have been folly in the purchaser if he had not insisted on having in some measure the management: for if between the day of bidding, and the confirmation of the purchase, the value of the mine had fallen, from some accidental cause injurious to the working, from some rival coalmine, or a destructive inundation; still if the title had been completed at the time his report was confirmed, he would have been compelled to take the property. Without entering into the question in this case whether the management has been advantageous or disadvantageous, let us suppose that the management has been advantageous, nobody can deny that to discharge a purchaser under such

circumstances, upon giving him his costs merely, without making some allowance for the expense incurred in the management, would be treating him in a way very detrimental to the general interest of all those who have collieries to dispose of through the intervention of this Court.

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If the case turned upon *Thorn*'s being a *bona fine* bidder there must have been further enquiry: but I have said quite enough to shew, that regard being had to the nature of the property, these biddings ought not to be opened. You cannot lay down rules which would be generally mischievous, in order to give a benefit to particular individuals. It is probable that if *Thorn* is a *bona fide* bidder, he may not be intended by these parties to become the final bidder. At all events it may turn out that somebody else will bid more,—then how is the security to be managed? The deposit of the whole money will not secure us from the possibility of a loss, because if there is one person who bids more, *Thorn* will be discharged, and his deposit can never be made a security for such subsequent bidder. In that case of *Wren* v. *Kirton* the Court was disposed to open the biddings, if security was given to answer the difference between the produce of the resale and the 15,000*l.*: but it is extremely difficult to manage the security unless the whole money is paid into Court, to remain in Court as a pledge that the next purchaser shall perform his contract.

The person who opens the biddings is discharged if he is outbid at the resale.

The order of the *Vice-Chancellor*, directing the biddings to be opened, was discharged.

1823.

January 31,
February 5 & 7.

WITHY *v.* COTTLE.

Upon a motion for a reference of title, where the performance of the contract is resisted upon other grounds, the Court will look into the answer to see whether those other grounds are substantial or frivolous.

Where the subject of the contract was a life annuity, and the defendant insisted that time was of the essence of the contract, a motion for a reference to the Master upon the title was refused.

THIS was a suit for the specific performance of an agreement to purchase a life annuity. The annuity was put up to sale by public auction on the 15th of *June* 1821: it was not then sold, but shortly afterwards the defendant agreed to become the purchaser according to the conditions of the sale by auction. Those conditions provided, that the purchaser should pay down a deposit of 20 *per cent.* in part of the purchase money, and should sign an agreement to pay the remainder on or before the 20th of *July* 1821, and should thereupon have a proper assignment of the annuity. The defendant stated in his answer objections to the title, and further insisted that time was of the essence of the contract, and that inasmuch as for the reasons stated in the answer, the plaintiff did not shew a good and marketable title to the annuity, according to the conditions of sale, before or on the 20th of *July* 1821, or before the filing of the bill, he was not bound to perform the agreement.

Upon the coming in of the answer, a motion was made before the *Vice-Chancellor* for a reference to the Master upon the title; and it was contended upon the authority of *Boehm* v. *Wood*, (*a*) that although the defendant resisted the performance of the agreement upon other grounds than mere defect of title, the Court would look into the answer to see whether the other objections were substantial or frivolous. It was insisted however by the defendant, that as the case did not rest upon the question of title merely, the Court was precluded from directing the reference, *Blyth* v. *Elmhirst*. The cases cited not appearing to be

(*a*) 1 Jac. & Walk. 419. 1 Ves. & Beam. 1.

reconcileable, his Honour directed the motion to be made before the *Lord Chancellor*.

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Mr. *Sudgen* and Mr. *Seton* for the plaintiff

Insisted, that by the inspection of the record it would appear, that time could not be of the essence of the contract; and relied upon *Boehm* v. *Wood*.

Mr. *Hart* and Mr. *Stuart* for the defendant,

Distinguished the present case from that of *Boehm* v. *Wood*, inasmuch as there it was clear from the circumstances that time was not of the essence of the contract: but that upon the sale of a life annuity, or a reversionary interest, delay for one or two years was of the utmost importance.

The LORD CHANCELLOR.

The rule which has been adopted of late years, to direct a reference to the Master in the first instance upon the question of title, does not prevail where the performance is resisted on other grounds: but when the Court has got the length of deciding that, it will take great care to look into the answer, for the purpose of seeing whether those other grounds are substantial or frivolous. With respect to time being made of the essence of a contract, there has been a great diversity of opinion: but it has never been denied, that the property sold may be of such a nature, as to make time of the essence of the contract, although the contract does not contain one single word about it. In that case of *Boehm* v. *Wood*, the Court upon looking into the answer saw the circumstances upon which it was contended that time had been made of the essence of the contract, and thought that that effect had not been produced: but it seems to me that the nature of the property may

The nature of the property sold may make time of the essence of a contract.

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make a very material difference; great consideration may be due to circumstances in one case, to which no attention would be paid in another. His Lordship concluded by observing that he would look into the answer.

The LORD CHANCELLOR.

February 5.

The objection which has been made to this motion is, that this is not a case in which the defendant puts the matter upon the question of title merely, but insists that time was of the essence of the contract, and that if a good title can now be made, he is not bound to take it. The question is, whether that suggestion made by the defendant will be sufficient to take the case out of the common rule. It strikes me that a great deal depends upon the nature of the property sold. If it be property, which by delay will not be of the same value as at the time of the sale, it forms a material consideration. In the case for instance of a contract to grant an annuity for the life of an individual, if you do not shew that you can grant the annuity, you prevent the party from selling or dealing with it, and in the mean time the individual for whose life the annuity is to be granted may die. It seems to me that the short way of disposing of this case will be, to set the cause down upon bill and answer, and discuss the point, whether the nature of the property does make time of the essence of the contract.

On a subsequent day the counsel for the plaintiff having stated, that the cause could not be heard upon bill and answer, the *Lord Chancellor* said that they must proceed to a hearing in the regular course.

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February 7.

A power of sale and exchange vested in the trustees of a settlement, may be exercised by the trustees upon a sale to or an exchange with the tenant for life of the settled estates.

Where upon the exercise of such a power it is declared that the estate shall be vested in the purchaser, the purchase being made in the name of a trustee, an appointment to the trustee, in trust for the purchaser, is a valid execution of the power.

BY an indenture, dated the 10th of *June* 1770, the rectory and tithes of *Horsham*, together with other hereditaments, were limited to the use of Sir *Thomas Broughton* for life, with remainder to the use of Lady *Broughton* for life, with remainder to the use of all and every or such one or more of the younger children of Sir *Thomas* and Lady *Broughton* as they should jointly appoint, and in default of such joint appointment, as Sir *Thomas Broughton*, if he survived, should appoint, and in default of appointment, to the use of all such younger children as tenants in common in tail general, with divers remainders over; and a power was given to *Robert Hill* and *Charles Goring*, at any time during the lives of Sir *Thomas* and Lady *Broughton*, and with their consent and direction, to be testified by writing under their hands and seals and to be attested by two or more credible witnesses, to sell or exchange all or any part of the said rectory tithes and other hereditaments, and the whole estate in fee and inheritance therein, and it was declared that when any part of the said premises should be sold, the same should thenceforth be freed and discharged from the uses by the said indenture declared thereof; and that then and from thenceforth the said indenture, and a fine therein mentioned to be intended to be levied by the said Sir *Thomas* and Lady *Broughton*, and all conveyances and assurances theretofore made or executed, or at any time thereafter to be made or executed, of the said rectory tithes and other hereditaments should be and enure, as to so much of the said premises as should be so sold, to the only use and behoof of the purchaser or purchasers thereof, and of his her and their heirs respectively for ever.

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By indentures of lease and release, dated the 23d and 24th of *November* 1781, the release being made between the said *Robert Hill* and *Charles Goring* of the first part, *Charlotte Wicker* of the second part, *Francis Weller Poley* of the third part, the said Sir *Thomas Broughton* and Dame *Mary* his wife of the fourth part, and *Henry Hoyle Oddie* of the fifth part, reciting, amongst other things, that the said *Henry Hoyle Oddie*, on the behalf of the said Sir *Thomas Broughton*, had agreed with the said *Robert Hill* and *Charles Goring* for the purchase of part of the tithes belonging to the said rectory of *Horsham*: It was witnessed, that the said *Robert Hill* and *Charles Goring*, in pursuance and exercise of the power in that behalf reserved by the said indenture of the tenth of *June* 1770, with the consent and direction of the said Sir *Thomas Broughton* and Dame *Mary* his wife, testified by that indenture under their hands and seals and attested by two credible witnesses, did grant bargain sell alien release and confirm, and the said Sir *Thomas Broughton* and Dame *Mary* his wife did, in pursuance of every power and authority enabling them in that behalf, grant bargain sell release ratify and confirm, unto the said *Henry Hoyle Oddie* and his heirs, the said tithes so agreed to be purchased: To hold to the said *Henry Hoyle Oddie* his heirs and assigns, to the use of the said Sir *Thomas Broughton* and *Henry Hoyle Oddie* their heirs and assigns for ever: but nevertheless as to the estate of the said *Henry Hoyle Oddie* his heirs and assigns, in trust for the said Sir *Thomas Broughton* his heirs and assigns.

By other indentures of lease and release, dated respectively the 26th and 27th of *November* 1781, reciting, amongst other things, that the said Sir *Thomas Broughton*, being seized in fee simple of a certain manor and other hereditaments, had proposed to make an exchange thereof with the said *Robert Hill* and *Charles Goring* for the said rectory of *Horsham*, and such of the tithes belonging

thereto as were not conveyed by the said last mentioned indenture. The said *Robert Hill* and *Charles Goring* did, in exercise of the powers and authorities reserved to them by the said indenture of the tenth of *June* 1770, with the consent of the said Sir *Thomas* and Lady *Broughton*, testified by the said indenture of release under their hands and seals, and attested by two credible witnesses, grant bargain sell alien release and confirm to the said Sir *Thomas Broughton* and his heirs the said rectory and tithes: To hold to the said Sir *Thomas Broughton* his heirs and assigns, in exchange for the said manor and other hereditaments thereby granted and released, by the said Sir *Thomas Broughton*, to the said *Robert Hill* and *Charles Goring* and their heirs, to the uses of the said indenture of the tenth of *June* 1770.

A contract having been entered into for the sale of part of the tithes, by persons who derived the property from Sir *Thomas Broughton*, the purchaser objected to the title, on the ground that the sale to and the exchange with Sir *Thomas Broughton*, were not valid executions of the powers of sale and exchange vested in the trustees by the indenture of the tenth of *June* 1770, inasmuch as Sir *Thomas Broughton* was by such last mentioned indenture required to be a consenting party to any sale or exchange to be made by the trustees under the power.

The bill was filed for a specific performance, and the cause was now brought on for the purpose of obtaining the opinion of the Court upon the objection taken by the purchaser.

Upon the hearing another objection was made to the title, that as the deed creating the power declared, that when any of the premises should be sold, the same should be vested in the purchaser; The appointment by the deeds of the 23d and 24th of *November* 1781 ought to have

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been made to Sir *Thomas Broughton*, and the power was not well exercised by appointing to *Oddie*, to the use of Sir *Thomas Broughton*.

Mr. *Hart* for the plaintiff.

Mr. *Shadwell* and Mr. *Blackburn* for the defendants.

The first question to be determined is, whether, where a power of sale is to be exercised with the consent of a tenant for life, a Court of equity will allow the tenant for life to become the purchaser. At law no objection can be made to an exercise of the power in favour of the tenant for life; but in equity, *quoad* his consent, he is a trustee: the Court will not allow him at the same time to be trustee and *cestui que* trust. There has been no judicial decision upon the point: but in 1801, upon a transaction similar to the present in which Lord *Sefton* was concerned, it was proposed to pass an act of parliament to meet the difficulty, and the Judges Sir *Archibald Macdonald* and Baron *Hotham*, to whom the act was referred, thought that there was no occasion for it. (*a*) Your Lordship has often ex-

(*a*) Mr. *Shadwell* has kindly furnished the Editors with a note of the certificate returned by the Judges to the House of Lords in this case.

After setting forth certain indentures of lease and release, dated the 11th and 12th of *February* 1796, by virtue of which Lord *Sefton* was tenant for life of the estates therein comprised, and which contained a power of sale and exchange to *William* Lord *Craven* and *John Charles Crowle*; and also certain other indentures of lease and release dated the 11th and 12th of *July* 1800, by which certain parts of the estates comprised in the former indentures were conveyed to Lord *Sefton*, in exchange for other estates conveyed by him to the uses of the settlement; and after stating that Lord *Sefton* having since the said exchange contracted for sale of various parts of the estates received by him in exchange, doubts had arisen whether the power of exchange so entrusted by the said marriage settlement

pressed disapprobation of tenants for life being permitted to purchase the settled estates.

There is another objection to the title.—The deed declares that upon payment of the purchase money the property sold shall be vested in the purchaser. The power can be executed at law only by adhering to the letter; the trustees in this case had not the legal estate, they were merely donees of the power; the consequence is, that the execution of the power operates as an appointment to *Oddie* of the legal estate; *Oddie* is an agent merely, and the power therefore is not well executed at law.

The LORD CHANCELLOR.

The cases in which I have expressed my disapprobation of tenants for life having been permitted to purchase the

was exercisable by the said trustees, *William* Lord *Craven* and *John Charles Crowle*, on an exchange with Lord *Sefton*, in respect of his being tenant for life of the settled estates so made exchangeable.

The certificate proceeds in the following words.

And we submit it to your Lordships that the passing of such a bill may cause a great prejudice to numerous titles under executions of powers of sale and exchange of a similar kind.

Signed, { ARCHD. MACDONALD.
B. HOTHAM.

April 27th 1801.

We have perused and signed the bill annexed; and we think the bill, if for the purpose therein expressed any bill should be deemed necessary, is proper. But we submit it as our opinion to your Lordships, that the doubt which is the cause of petitioning for the bill is not well founded, therefore that the bill is unnecessary.

By a letter annexed to the foregoing note it is stated, that the Judges, to whom this bill was referred, having been struck with the importance of the question raised upon the power of exchange, delayed signing their report till they had an opportunity of consulting the other Judges upon the subject.

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settled estates, have been cases where the property has been sold under the directions of this Court; when a sale takes place in the Master's office, the tenant for life is the only person who knows any thing about the value of the estate, and he therefore buys at a great advantage: but there is a difference between that case and the present; for here the consent of the tenant for life is not all that is necessary, there must be a diligent attention on the part of the trustees to see that they get a reasonable price. There may undoubtedly be cases in which more may be obtained from the tenant for life than from any other person, and if practice has sanctioned such transactions as the present, I am sure I will not disturb them.

With respect to the second point, there is nothing in the nature of such a power as this to prevent one man from becoming a purchaser in trust for another; and considering Mr. *Oddie* as the purchaser, it does not appear to me to be any objection to the execution of the power, that the parties have thought proper to put upon the instrument a declaration of trust for the person for whose benefit he is a purchaser. It appears to me to make no difference, whether the purchaser chooses to execute a declaration of trust by the same instrument, or by another instrument.

From the way in which the two Judges put their opinion upon the case before the House of Lords I think they must have proceeded upon the practice of conveyancers; and if the practice was in favour of such transactions before the Judges certified, and continued so for some time afterwards, I will not unsettle it upon any subsequent doubts which may have been entertained. I should have said originally that it would not do: but whatever other people may say upon the subject, I think that the practice of conveyancers has settled a great deal of law, and if we have got no further than this, that the antecedent practice has been doubted, I should be disposed to abide

by that antecedent practice. I put this case therefore on the practice of conveyancers, and after the abuse which I have heard at the bar of the House of Lords and elsewhere upon that subject, I am not sorry to have this opportunity of stating my opinion that great weight should be given to that practice.

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1822.
November 4.
1823.
February 6, 7.

A solicitor has no lien upon the will of his client, and cannot refuse to produce a deed executed by the client in his favour, containing a reservation of a life interest, and a power of revocation.

Where a deed is sought to be impeached, the plaintiff is entitled to have it produced, and the defendant cannot resist the production upon the ground of lien.

In a suit instituted against a solicitor, who had also acted in the capacity of steward, for an account and for delivery of title deeds, the Court upon motion ordered the deeds to be delivered up to the plaintiff, upon payment into Court of so much of the balance claimed by the answer as was not covered by any security.

IN the month of *January* 1814, the plaintiff employed the defendant as her steward, for the purpose of receiving her rents, and superintending and managing her estates. The defendant continued in the service of the plaintiff till the month of *April* 1822, and during the period of his employment as steward, he also transacted the plaintiff's pecuniary business, received and paid money on her account, and acted as her solicitor and confidential agent in all her affairs.

The bill stated, that the defendant had got into his possession all the title deeds relating to the plaintiff's estates, that he had taken advantage of the confidence reposed in him, and had fraudulently and improperly induced the plaintiff to make a will, containing a disposition in his favour, and to execute a deed, by which part of her estates were conveyed to him: that he retained the will and deed in his possession, and had procured from the plaintiff certain bonds for securing sums which he alleged to be due

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to him, and after charging that at the time when the said bonds were executed, the accounts of the receipts and payments of the defendant on account of the plaintiff had not been audited, and that the sums mentioned in the bonds were not due from the plaintiff. The bill prayed, that the defendant might be decreed to deliver up to the plaintiff the title deeds relating to her estates; that an account might be taken of the rents and other sums of money received by the defendant on account of the plaintiff; and that the said will and deed might be declared to have been improperly and fraudulently obtained, and might be delivered up to be cancelled.

The defendant by his answer stated, that upon the balance of his receipts and payments he had generally been in advance to the plaintiff, during the period of his employment by her, and that he had on several occasions delivered to the plaintiff statements of his receipts and payments on her account, upon the settlement of which, the plaintiff had acknowledged the balance to be in his favour, and had executed bonds to secure the amount which was found to be due from her. The answer then set forth the bonds executed by the plaintiff to the defendant upon the settlement of accounts,—one of such bonds, dated the 11th of *January* 1815, secured to the defendant, in addition to the money alleged to be due to him at the time of its execution on the balance of his accounts with the plaintiff, a further sum, also alleged to be due to him from the plaintiff's late brother, and with which it was stated by the answer that the plaintiff had consented to be charged. Another of such bonds, dated the 21st *May* 1817, secured to the defendant the money alleged to have become due to him since the settlement of his last account with the plaintiff, and also his costs as the plaintiff's solicitor up to that time; and the other of such bonds, dated the 1st of *January* 1818, secured to the defendant the money alleged to have become due to him since the settlement of his account with

the plaintiff on the 21st of *May* 1817, and also a sum of 2000*l.* by way of gift or reward for his services to the plaintiff and her family. The answer also stated that the sum of 356*l.* 14*s.* 1*d.*, or thereabout, had become due to the defendant from the plaintiff on the balance of the account since the last settlement; and it further appeared by the answer that the plaintiff had on the 21st of *May* 1817, executed a deed, by which she released the defendant from all demands up to that time, and that she had secured to the defendant by a bond and promissory note the payment of a sum, which it was alleged that he had advanced to another person upon her credit. The answer, after further stating that the plaintiff was a single woman, advanced in years, without any near relations, and that in the month of *June* 1819, being desirous to make a settlement of her property, and being undetermined in what manner to dispose of it, she consulted the defendant on the subject, and that the defendant then named to her several persons to whom she was most nearly related, but that she did not approve of the persons so named to her, and suggested that she might as well give her property to the defendant, as to any other person, went on to state, that on the 13th of *August* 1819, the plaintiff duly executed certain indentures of lease and release, by one of which indentures of release she conveyed to the defendant an estate, called the Farm Estate, and certain other property, in trust for herself for life, and after her death, in trust for the defendant, with a proviso enabling her to revoke the indenture by deed or will; and by the other of which indentures of release, she conveyed her other property to the uses therein mentioned: After referring to these indentures in the usual manner, the answer further stated, that in consequence of the plaintiff not having then determined to whom she should give the property comprized in the second mentioned indenture of release, the names were not inserted in that indenture at the time of its execution, and that afterwards, on the 6th of *December* 1819, the plaintiff having fixed upon the per-

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son to whom she would give the said last mentioned property, directed the defendant to get new deeds drawn for the purpose of conveying the same to her own use for life, and subject thereto, and to the payment of her funeral and testamentary expenses debts and legacies, to the use of the person so fixed upon by her, and at the same time instructed the defendant to have her will prepared, under which it appeared that the defendant was residuary legatee; and after stating, that the said last mentioned deeds and the said will were accordingly prepared, and were executed by the plaintiff on the 14th of *January* 1820, and that the same were retained by her in her own custody until the 5th of *December* 1821, when she delivered them to the defendant, for the purpose of being shewn to a person who was expected to lend her money on being satisfied that she had made a provision for the payment of her debts; and further stating, that all the said deeds and the said will were conformable to the instructions of the plaintiff, and to her wishes with regard to the disposition of her property after her death, and that they were read over and explained to the plaintiff previous to the execution thereof; the defendant stated, that he had for forty years been employed by the plaintiff and by other members of her family, and that he had on several occasions rendered to them many important services; and after admitting that he was in the possession of the will of the plaintiff, of the said several deeds, and of a great number of other deeds and writings belonging to the plaintiff, and that he had got the same into his possession in the course of exercising the office of steward for the plaintiff, and otherwise acting as her agent, the defendant submitted, that he was entitled to a lien on the same, for securing the payment of what was due to him from the plaintiff, and that he ought not to be called upon to part with the possession thereof till such payment was made.

A motion was made by the plaintiff, that the defendant

might forthwith produce and leave in the hands of his clerk in Court for the purpose of inspection, the several deeds stated to have been executed on the 13th of *August* 1819, and the 14th of *January* 1820, together with the will of the plaintiff, and the other deeds belonging to her, which were admitted by the defendant to be in his possession.

Mr. *Hart*, Mr. *Shadwell*, and Mr. *Swanston*, in support of the motion

Contended, that the lien of the defendant could not be affected by the production required, and that the acceptance of securities superseded the lien, *Cowell* v. *Simpson*. (*a*) That the deeds were by reference incorporated into the answer, and that where it is the object of a suit to impeach a deed, the defendant cannot refuse to produce it, *Beckford* v. *Wildman*. (*b*)

Mr. *Heald* and Mr. *Bickersteth* for the defendant

Consented to the production of the will, and of the deeds stated in the answer to have been executed by the plaintiff in *August* 1819 and *January* 1820: but resisted the production of the other deeds, on the ground that the balance which had become due to the defendant since the last settlement of accounts was not covered by any security, and that he had therefore a lien in respect of it.

The LORD CHANCELLOR.

It is no uncommon thing to reflect upon persons who have framed deeds and wills in their own favour, but although it seems to me that the framing of such instruments is a transaction in which gentlemen ought not to

(*a*) 16 Ves. 275. (*b*) *Ibid.* 438.

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employ themselves, I by no means concur in the opinion of Mr. *Justice Buller*, who in a case from *Winchester* considered that circumstance as almost decisive evidence of fraud. (*a*) The nature of the transaction depends upon the circumstances of the case, and clearly admits of explanation. Where a person executes a deed in favour of her solicitor, and reserves to herself a life interest and a power of revocation, it is quite impossible for the solicitor to refuse to produce the deed; it is his duty to leave a counterpart of it in the hands of his client. In such a case no consent can be required, and I will not establish such a doctrine as that consent is necessary; so with respect to a will, an instrument which may be altered even *in articulo mortis*, and on which a solicitor can have no lien. (*b*)

Where a client executes a deed in favour of a solicitor, reserving a life interest and a power of revocation, it is the duty of the solicitor to leave a counterpart of the deed in the hands of the client.

Notwithstanding the Court of King's Bench has expressed a doubt, whether my decision was right in the case of *Cowell* v. *Simpson*, I still entertain the opinion, that an attorney who takes a security abandons his lien. That doctrine however will not apply to sums which are not covered by the security, and as to those sums therefore the lien must be considered to remain. There is a peculiar circumstance in this case which was adverted to in argument, that some of the deeds were delivered to the defendant for the purpose of shewing to some person that the plaintiff had made a provision for her debts; now although where deeds are delivered for the purpose of conducting a suit, the general lien must prevail, yet where they are delivered for a specific purpose, beyond that purpose there can be no lien. Where a deed is sought to be impeached, the plaintiff is entitled to have it produced, and no lien can protect the defendant from producing it, for it is the object of the suit that the deed may be declared a nullity. A considerable question however may arise at what period of the cause the production can be compelled.

Solicitor's lien is superseded by taking a security.

(*a*) *Paine* v. *Hall*, 18 Ves. 475. (*b*) *Georges* v. *Georges*, 18 Ves. 294.

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The order was made for the delivery to the plaintiff personally, or to her clerk in Court, at the option of the defendant, of the plaintiff's will, and of the deeds executed in *August* 1819, and *January* 1820, with liberty to the plaintiff to mention the motion again as to the other deeds on the question of lien.

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A motion was now made by the plaintiff, that she might be at liberty to pay into Court the sum of 356*l.* 14*s.* 1*d.* the balance alleged by the defendant in his answer to be due from her, over and beyond the sums secured by the bonds in the answer mentioned, and that upon such payment being made, the defendant might be ordered within ten days to deliver upon oath to the plaintiff, or such person as she should appoint, all the title deeds, Court rolls, monuments, maps, plans, letters, accounts, papers, and writings, delivered to the defendant by the plaintiff, or belonging to the plaintiff, in the custody or power of the defendant.

After the notice of motion was given, the defendant delivered a further bill of costs as the solicitor of the plaintiff, amounting to the sum of 1250*l.*

Mr. *Hart*, Mr. *Shadwell*, and Mr. *Swanston* for the motion.

The doctrine laid down in *Cowell* v. *Simpson* was doubted by the Court of King's Bench in *Stevenson* v. *Blakelock*: (*a*) but in a subsequent case of *Chase* v. *Westmore* (*b*) your Lordship's decision was acquiesced in. Since the notice of motion was given the defendant has advanced a further claim: but he is bound by his answer, and cannot now be permitted to avail himself of that claim.

(*a*) 1 Maul. and Selw. 535. (*b*) 5 Maul. and Selw. 180.

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Admitting however that he can bring forward the claim, he has no lien upon the deeds: he obtained possession of them in the character of steward, and he can have no lien upon them for what is due to him in any other character, *Champernown* v. *Scott*. (*a*)

Mr. *Heald* and Mr. *Bickersteth* against the motion.

The LORD CHANCELLOR made the order.

(*a*) 6 Madd. Rep. 93.

February 18.

VERLANDER *v.* CODD.

Where the plaintiff is misnamed in an order to dismiss a bill for want of prosecution, in consequence of an error in the six clerks' certificate, a replication filed after service of the order will not be irregular. *Semble.*

IN this case the defendant having put in his answer, and no further proceedings having been taken by the plaintiff, an order was obtained to dismiss the bill for want of prosecution. In the six clerks' certificate produced to the registrar, the plaintiff, whose real name was *Jacob Alexander Verlander*, was misnamed *Daniel Verlander*, and in consequence of that mistake, the order to dismiss the bill was drawn up and served in the name of *Daniel Verlander*; after service of the order the plaintiff filed a replication. A motion that the replication might be taken off the file for irregularity, having been made before the *Vice-Chancellor* and refused, (*a*) the same motion was now made before the *Lord Chancellor*.

Mr. *Horne* and Mr. *Bligh*, in support of the motion

Contended, that as the order operated from the time it

(*a*) 1 Sim. and Stew. 94.

was pronounced, no subsequent clerical error in drawing it up could destroy its effect, *Lorimer* v. *Lorimer*. (*a*)

Mr. *Wakefield* against the motion

Insisted that slight errors of this kind were sufficient to vitiate proceedings, and referred to the cases of *Bingham* v. *Dickie*, (*b*) *Ex parte Ward*, (*c*) *Ex parte Schofield*. (*d*)

The LORD CHANCELLOR.

The misnomers in the cases referred to were of very serious consequence. In the first, which was an error in the description of plaintiffs in a bail-piece, the bail-bond was put in force against the bail; and with respect to the other two cases, which are cases in bankruptcy, it must be remembered that the bankrupt, not having surrendered himself, would have been guilty of felony without benefit of clergy. (*e*) In this case there is no room for any argument, as there might be in the case of bankruptcy, from what would have been the effect if subsequent proceedings had been had. If a bankrupt, notwithstanding the misnomer, has submitted to the commission, he could not in any subsequent proceeding be allowed to dispute it: but here the very act of filing the replication is an act of non-submission; the cases cited therefore are not similar to the present, and we must see how this motion stands upon principle. According to the old practice, upon a motion to dismiss the bill for want of prosecution, it was necessary to bring into Court the certificate of the six clerk; and I take it to be quite clear, that if the six clerk's certificate was produced in a cause in which *Daniel Verlander* was

(*a*) 1 Jac. and Walk. 284.
(*b*) 5 Taunt. 814.
(*c*) 1 Rose 314.
(*d*) 2 Rose 246.
(*e*) Stat. 5 Geo. II. c. 30. s. 1 and 2.

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plaintiff, upon a motion to dismiss a bill where the plaintiff's name was *Jacob Alexander Verlander*, the Court would not have granted the order: if then the Court according to the modern practice so far indulges the party, as to give him credit that he is entitled to have the certificate, and makes the order operative from the time of pronouncing it, leaving the party to produce the certificate to the registrar, the question is, whether the party does not stand in the same situation, if he takes the certificate full of mistakes, as he would have done, if according to the old practice he had had the certificate in Court to produce at the time when the motion was made. I cannot help saying that there is more reason in the refusal of the *Vice-Chancellor* than I was at first disposed to think.

Upon this intimation of the *Lord Chancellor's* opinion, the counsel for the plaintiff did not press the motion further, and it was agreed that the replication should stand, each party paying his own costs.

January 28, *Feb.* 5, 11, 20.

PANNELL *v.* TAYLER.

A writ of *ne exeat regno* against a feme covert administratrix cannot be sustained.

THE bill in this cause was filed by three of the children of *John Herlock*, who died intestate, against his other surviving children, and his widow and her second husband. The bill stated, that the intestate died on the 1st of *December* 1806, leaving his widow and nine children; that the widow obtained letters of administration of the personal estate and effects of the intestate, and afterwards intermarried with the defendant *Thomas Tayler*; and that previously to, or shortly after her marriage, she ascertained the clear residue of the intestate's

personal estate, and having retained one-third part thereof for her own use, apportioned the remaining two-third parts into nine equal shares, each of which amounted to the sum of 300*l.* 3*s.* 10*d.*

The bill then stated, that several of the children of the intestate had been paid their respective shares, but that the other shares, including what was due to the plaintiffs, and amounting in the whole to the sum of 1500*l.* 19*s.* 2*d.* still remained in the hands of the said *Thomas Tayler* and *Jane* his wife; And after further stating, that by the death of one of the children whose share was unpaid, the said *Jane Tayler* had become entitled to her distributive share of that part of the 1500*l.* 19*s.* 2*d.* which belonged to the child so dying, and that the said *Thomas Tayler* was gone to reside abroad, and the said *Jane Tayler* was about to leave the country; the bill prayed, that the sums ascertained to be due to the plaintiffs might be paid to them, or that the usual accounts might be taken of the personal estate and effects of the intestate, and that the writ of *ne exeat regno* might issue to restrain the said *Jane Tayler* from departing from or leaving *England.* The facts stated in the bill were verified by affidavits filed with it.

Mr. *Barber* moved for the writ in the *Lord Chancellor's* private room; and after several applications, his Lordship, having been referred to the cases of *Moore* v. *Meynell* (*a*) and *Jernegan* v. *Glasse,* (*b*) considered himself bound by

(*a*) 1 Dick. 90.

(*b*) 1 Dick. 107. 3 Atk. 409. Ambl. 62. See the extract from the Register which is subjoined.

24th *January* 1746.

Francis Jernegan and Others, Plaintiffs.

Edward Ashe Perkins, Richard Acton, Alexander Glasse, and *Frances* his wife, Defendants.

Upon opening of the matter this present day unto the Right Honourable the Lord High Chancellor of *Great Britain,* by Mr. *Newman,* being of counsel with

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authority, and directed the writ to issue, and to be marked in the sum of 1500*l.* 19*s.* 2*d.*

A motion was now made on behalf of Mrs. *Tayler*, who had not entered an appearance, to discharge the writ.

the plaintiffs, it was alleged, that the defendant *Frances Glasse*, now the wife of the defendant *Alexander Glasse*, and late the widow and executrix of *Henry Jernegan* the plaintiff's father deceased, hath possessed herself of all the goods and effects of the said *Henry Jernegan*, and hath withdrawn herself from her late habitation, without giving any account of her said late husband's effects, or paying the plaintiffs what is due to them for their portions and maintenances. That the said *Alexander Glasse* is now actually gone beyond the seas with some part of the effects late of the said *Henry Jernegan* deceased, and the said defendant *Frances* his wife, hath threatened and given out, that she will speedily leave the kingdom and go beyond the seas to her said husband, whereby the plaintiffs will either lose their several debts, or the same will be very much endangered, and it will be difficult for them to recover their demands; that there is now justly due to the plaintiff *Nicholas Jernegan*, from the estate of his said father deceased, the sum of 634*l.* 18*s.*, and to the other plaintiffs the sum of 1200*l.* and upwards, as the said plaintiff *Nicholas* computes the same. That the said defendant *Frances Glasse*, did some time in *September* last declare, in the said plaintiff *Nicholas Jernegan*'s presence, that the said plaintiff *Nicholas*, and the rest of the creditors of the said *Henry Jernegan* deceased, might make themselves very easy, for that the said *Henry Jernegan* had left effects sufficient to pay all his debts; as by the affidavit of the said plaintiff *Nicholas Jernegan* now produced and read appears; to be relieved wherein the plaintiffs have exhibited their bill in this Court against the defendants, as by the six clerk's certificate, dated the 17th instant, appears. It was therefore prayed, that a writ of *ne exeat regno* may be awarded against the said defendant *Frances Glasse*, until she shall have fully answered the plaintiff's bill, and this Court make other order to the contrary, which is ordered accordingly; and the said writ is to be marked in the sum of one thousand eight hundred pounds in words at length, and not in figures. [Reg. lib. A. 1746. fol. 155.]

Mr. *Agar* and Mr. *Duckworth* in support of the motion.

The circumstances of the cases upon the authority of which this writ has been issued are peculiar. In *Jernegan* v. *Glasse*, Lord *Hardwicke* acted upon the precedent of *Moore* v. *Meynell*: but that latter case proceeded upon the principle, that the feme covert administratrix had acted as a feme sole by appearing to the suit, her husband being out of the jurisdiction. It is an established principle that the writ of *ne exeat regno* cannot be granted in cases, where, if the demand was a legal demand, the party could not be held to bail at law. If an action could have been maintained in this case, it is clear that the feme covert could not have been held to bail. Another objection is, that this writ is marked for the whole amount of the personal estate in the hands of the defendant, to part of which she is herself entitled. If the plaintiffs could have proceeded at law, they could have sued only for their respective shares, they cannot hold the defendant to equitable bail beyond that amount. After the writ has passed the great seal, the Court cannot vary it; the indorsement therefore being wrong, the writ must be quashed.

Mr. *Hart* and Mr. *Barber* for the plaintiffs.

Upon the first point, that the writ may issue against a feme covert executrix, the authorities are uniformly in our favour; and in *Jernegan* v. *Glasse* the defendant had not appeared. There are many cases in which a feme covert may be taken up upon the process of the Court; *Dubois* v. *Hole*. (*a*) The Court cannot preserve the property of the plaintiffs without securing the whole amount of the personal estate; for if the shares of the plaintiffs only are brought into Court, the other parties

(*a*) 2 Vern. 613. and see the cases cited in the note.

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interested in the estate will be entitled to a proportion of the fund.

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Where a writ of *ne exeat regno* issues for a larger sum than is due, the Court will make an order that so much only shall be raised as is due, without quashing the writ.

Where the writ issues for a larger sum than is really due, there is no doubt that the Court will make an order, that so much only shall be raised as is really due, without quashing the writ, and that too where the motion is in terms to quash it: but here if the writ can be supported at all, it must be indorsed for the whole amount of what is due, not only to the plaintiffs, but to other persons; for if one of several legatees, being entitled to 100*l.*, gets that 100*l.* into Court, he cannot get it out again whilst the other legatees remain unsatisfied, because he sues on behalf of himself and all the other legatees, and is only entitled to a proportion of the sum deposited. There was this difference between law and equity, so long as the practice of bringing actions at law for legacies existed, that a legatee if he recovered at all at law, recovered the whole amount of his legacy: but in equity he is entitled to a proportion only till all the legacies are satisfied.

Where the writ issues against an executor at the instance of a legatee, it must be marked for the whole amount of what is due, not only to the plaintiff, but to other persons.

Feme covert holding herself out in the character of a feme sole may be arrested, and courts of law will not discharge her upon motion.

The law as it now stands with regard to coverture, differs materially from the old law. The modern practice is, that if a feme covert holds herself out to the world in the character of a feme sole, she may be arrested; and the Courts of law will not discharge her upon motion, but will put her to her plea of coverture, and to proof of that plea. But the old law seems to have considered it impossible that she should separate herself from her husband, unless he abjured the realm or was transported. Mr. *Justice Buller* indeed held, that there might be cases in which a married woman might be treated as a feme sole to all intents and purposes, and that was held to be law for twenty years: but when it came into the Exchequer Chamber, it was overruled. I contributed to make Mr. *Justice Buller* alter

his mind on this point, by asking him what he meant by the expression "to all intents and purposes." Could a married woman be a witness against her husband? In cases of felony jointly committed by her and her husband, could she be treated as a feme sole? Then as to a deed of separation having the effect of making her liable as a feme sole,—where was it laid down that a feme covert could execute a deed?

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I cannot think that Lord *Cowper*, Lord *Macclesfield*, a great common lawyer, and Lord *Hardwicke* a still greater common lawyer, would have granted this writ against a feme covert executrix, without being satisfied with the principle upon which it was granted. What that principle was, I cannot find out: but they might see analogies which I am unable to discover. It is clear that in one of the cases the party had not appeared.

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In that case of *Moore* v. *Meynell* it seems as if the husband appeared at the hearing; and instead of the decree being against him and his wife, as a judgment at law would have been, it is against him alone, and she goes free. Could the Court have made that decree if the husband had not appeared? This case must be argued again. *February* 5.

The motion now came on for further argument. *February* 11.

Mr. *Agar* and Mr. *Duckworth* in support of the motion.

It appears by the decree in *Moore* v. *Meynell* that that case has very little analogy to the present: the feme covert there had large separate property; she had executed bonds,

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and it seems to have been contended, that she had rendered her separate estate liable to the payment of the debt. If the Court maintains the writ against this feme covert,—what decree can be made at the hearing? The decree must be against the husband, and he is not before the Court. Where husband and wife are arrested at law upon mesne process, the husband must put in bail for both; and the wife when arrested without her husband is entitled to be discharged upon putting in common bail. *Edwards* v. *Bourke* and Wife, (*a*) *Crookes* v. *Fry* and Wife, (*b*) *Wilson* and *Serres*. (*c*) It is now the practice to discharge the wife when taken in execution as well as on mesne process, (*d*) so that there is no case in which a feme covert can at common law be kept in custody. If upon a legal demand the Courts of law will not permit a feme covert to be arrested, courts of equity will not upon an equitable demand exercise this prerogative writ against her.

Mr. *Hart* and Mr. *Barber* for the plaintiffs.

There may be some difficulty in discovering the principle upon which this writ issues against a feme covert: but the practice has continued for a century, and the question is set at rest by the authorities. The writ has regularly issued; and the defendant, before she applies to be discharged, must shew that she is willing to satisfy whatever the justice of the case requires. The Court can do no act in her favour till she has put in her answer; the discovery furnished by the answer may pave the way for the appointment of a receiver, and may enable us to render the property of the husband amenable. The case of *Moore* v. *Meynell* is precisely in point.

(*a*) 1 T. R. 486.
(*b*) 1 B. & A. 165.
(*c*) 3 Taunt. Rep. 307.
(*d*) Tidd's Pract. 7th edition, 220, 1043.

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The strong inclination of my opinion now is, that I cannot maintain this writ. No instance has been produced to me of such a writ having been granted since the year 1746, a period of nearly eighty years; and in that case in *Ambler*, (*a*) Lord *Hardwicke* seems to have been quite as much startled as I was, when this application was first made to me.

In cases of *ne exeat regno* a court of equity proceeds by analogy to the proceedings at law in cases of legal bail.

It has always been understood, that a court of equity in cases of *ne exeat regno* proceeds in some respects by analogy to the proceedings at law in cases of legal bail. There is no case in which you can hold a party to bail in equity, where you might hold him to bail at law, except on the balance of an account: (*b*) but in other cases the general rule is, that in an equitable case you cannot hold a party to equitable bail, where in a legal case you could not compel him to give effectual legal bail. I leave now out of my consideration all the cases in which a married woman has separate property, because in those cases the Court knows how to deal with her. But where she is merely administratrix, it is clear that she has no power to act without her husband.

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Upon the best consideration which I have been able to give this case, I have come to the conclusion, that had I been apprized of the circumstances of the case of *Moore* v. *Meynell* I should not have granted this writ, and that the writ must therefore be discharged. There may be a very great difference between the case of a married woman who has separate property, and the case of a married woman who is administratrix, and as administratrix can have no separate property at all.

(*a*) *Jernegan* v. *Glasse*, *ante* 97, 98.

(*b*) See *Flack* v. *Holme*, 1 Jac. and W. 405.

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LEWIS *v.* LEWELLYN.

ROLLS, *February* 20.

Before *Best*, Justice, and *Masters Courtney* and *Dowdeswell*, for the *Master of the Rolls*.

A testator having a power of appointment over certain freehold and copyhold estates, and being seised of other freehold estates, devises all his freehold and copyhold estates, without reference to the power: Held an execution of the power as to the copyhold estates, but not as to the freehold estates which were subject to the power.

BY indenture of settlement, dated the third of *January* 1809, and made previous to the marriage of *Morgan Lewellyn* and *Margaret Williams*, certain freehold and copyhold estates were limited, to the use of the said *Morgan Lewellyn* for life, with remainder to the use of the said *Margaret Williams*, afterwards *Margaret Lewellyn*, for life, with remainder to the use of such person or persons, and for such estate and estates, and for such trusts intents and purposes, and charged and chargeable in such manner and form, as the said *Morgan Lewellyn*, by any deed or deeds, instrument or instruments in writing, with or without power of revocation, to be sealed and delivered by him in the presence of and attested by two or more credible witnesses, or by his last will and testament in writing, or any writing in the nature of a will, or any codicil or codicils, to be by him signed sealed and published in the presence of and to be attested by three or more credible witnesses, should direct limit or appoint; and in default of appointment, to the uses therein mentioned.

The said *Morgan Lewellyn* by his will, dated the 2d of *February* 1814, duly executed and attested so as to pass freehold estates, directed that all his just debts, as well by specialty as by simple contract, funeral and testamentary expenses, should be paid as soon as conveniently might be after his decease, and charged all his freehold copyhold and leasehold estates thereinafter mentioned with the pay-

ment thereof; and subject thereto, he devised and bequeathed all his real and personal estates to his brother *Charles Lewellyn*, one of the defendants, his heirs executors administrators and assigns, according to the nature of the property respectively, and appointed the said *Charles Lewellyn* sole executor of his will.

The testator had no other copyhold estates except those which were comprized in the settlement, but he had other freehold estates.

After the death of the testator, the bill was filed by his creditors, praying that the usual accounts might be taken of the personal estate, and that it might be declared that the will operated as an appointment of the freehold and copyhold estates comprized in the indenture of settlement; and that the whole, or a sufficient part thereof, might be sold to pay the testator's debts in aid of his personal estate.

The defendant *Morgan Lewellyn*, who claimed through the person entitled under the settlement in default of appointment, by his answer claimed such interest in the settled estates, as the Court might consider him entitled to.

Mr. *Shadwell* and Mr. *Bickersteth* for the plaintiffs.

We admit that there can be no question as to the freehold estates: but the testator not having had any other copyhold estates than those comprized in the settlement, the words of the will must as to the copyhold estates be considered as an execution of the power, since otherwise they would be wholly inoperative, *Standen* v. *Standen*. (*a*) The distinction is clearly settled, that in the appointment

(*a*) 2 Ves. J. 589.

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of personal estate by will, there must be some reference to the power, because every person is possessed of some personal property, and the Court will not enquire into the *quantum*: but in the case of real estate, the Court will resort to the power, although the devise be general, if it finds that there is no property to satisfy the will, except what is subject to the power. (*b*)

Mr. *Sugden* and Mr. *Knight* for *Morgan Lewellyn*.

The Court cannot make the words of the will operate in two different ways: the same words cannot operate as an appointment of the copyhold, but as a general devise only of the freehold estates. Nothing is so common as for persons to include copyholds in their wills, when they have none, because subsequently acquired copyholds will pass by a will without a republication.

Best, Justice.

The question in this case is, whether the clause cannot be divided, and considered as operating in one sense with respect to the copyhold, and in another with respect to the freehold. If it can, and the case of *Standen* v. *Standen* is rightly decided, I think it applies strictly to this case.

The will does not refer to the power; but the question is whether it does not refer to the estate. It refers to the estate in clear and unequivocal terms; and as the rule is that all the words of a will should, if possible, have effect, and these words with respect to copyholds cannot be satisfied by any thing short of considering them an execution of the power, *ut res magis valeat quam pereat*, they should be so construed. That is the general principle of *Standen* v. *Standen*; and we must look only to the general principle,

(*a*) *Bennett* v. *Aburrow*, 8 Ves. 609. *Jones* v. *Currie*, 1 Swanst. 66.

for it is impossible to find two cases precisely alike. The general reasoning in some points of Lord *Rosslyn's* judgment may have been repudiated: but the principle remains unshaken. The principle is, that where there is nothing for the will to operate upon, but with reference to the power, it must operate as an execution of the power.

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For these reasons I am of opinion that the will is an execution of the power as to the copyholds.

BETWEEN MARQUIS CHOLMONDELEY and the Honourable ANN SEYMOUR DAMER, ... PLAINTIFFS;
AND
LORD CLINTON, . . DEFENDANT.

1822.
Nov. 25, 26,
Dec. 7.
1823.
Feb. 22.

An estate being in lease, A. enters and receives the rents during the continuance of the lease, and afterwards continues in possession, up to a period more than twenty years distant from the time of his entry. Within 20 years after the expiration of the lease, B. brings an ejectment, and files a bill for discovery; though the ejectment might be maintained at law, a demurrer to the discovery is good.

Where there has been adverse possession, not accounted for by some disability, as coverture or infancy for twenty years, a court of equity ought not to interfere.

THE bill in this case was filed in *Trinity Term* 1813, for a discovery in aid of an action of ejectment, brought upon the joint and several demises of Lord *Cholmondeley* and Mrs. *Damer*, and upon the demise of certain other persons, with respect to whom it was stated, that doubts had arisen, whether they were seized of the legal interest in the estates in question, under a codicil to the will of *George* Earl of *Orford*. The bill stated, that *Roger Tuckfield* being seized in fee simple of a moiety of the manor and borough of *Ashburton*, did by indentures of lease and release dated the 26th and 27th of *April* 1706, convey the same, together with other hereditaments, to the

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use of himself for life, with remainder to the use of the heirs of his body, with remainder to the use of his sister *Margaret*, the wife of *Samuel Rolle*, for ninety-nine years if she should so long live, with remainder to the use of trustees during the life of the said *Margaret Rolle*, with remainder to the use of the first and other sons of the said *Margaret Rolle* successively in tail male, with remainder to the use of her issue female, with remainder to the use of his own right heirs for ever. That the said *Roger Tuckfield* died intestate and without issue leaving the said *Margaret Rolle* his sister and heir at law. That the said *Margaret Rolle* the elder had issue, a daughter, *Margaret Rolle* the younger, who intermarried with *Robert Walpole*, afterwards Earl of *Orford*, and by him had issue a son, *George*, afterwards Lord *Walpole* and Earl of *Orford*; and that by a deed poll dated the 2d of *April* 1750, the said *Margaret Rolle* the elder, limited the remainder in fee of the said moiety of the said manor and borough of *Ashburton*, to the use of the said *George* Lord *Walpole* for life, with remainder to the use of trustees to preserve contingent remainders, with remainder to the use of the first and other sons and first and other daughters of the said *George* Lord *Walpole* successively in tail general, with remainder to the use of the said *George* Lord *Walpole* his heirs and assigns for ever. And after further stating, that the said *Margaret Rolle* the elder died in 1754, leaving *Margaret Rolle* the younger, then Countess of *Orford*, her only child and heir at law; and that *Margaret* Countess of *Orford* died in 1781; and that upon her death, the said *George* then Lord *Walpole* became, as the plaintiffs were advised, seised of the aforesaid estate at *Ashburton* by purchase as tenant in fee simple in possession, subject to the contingency of his having issue, under and by virtue of the limitations contained in the said deed-poll of the 2d of *April*, 1750; the bill went on to state, that the said *George* Lord *Walpole*, then Earl of *Orford*, did not by his will dispose of or affect the said estate at *Ashburton*,

and that by a codicil to his will, dated the 4th of *December* 1776, after reciting that he had by his will devised all his real estates to certain uses, but had not charged the same with the payment of his debts or legacies, he revoked his said will so far as the same was incompatible with his said codicil, and subjected all his real and personal estate whatsoever and wheresoever to the payment of all his just debts, and the legacies thereinafter mentioned, and funeral expenses; and for effectuating the payment thereof, he gave devised and bequeathed all his said real and personal estates to be sold, and directed and empowered his trustees therein named, or the survivors or survivor of them, his heirs, executors, or administrators, as soon as conveniently might be after his death, to sell and dispose of the same for the payment of his debts, legacies, and funeral expenses; and appointed the trustees therein named to be the executors of his will.

The bill then stated, that *George* Earl of *Orford* died on the 5th of *December* 1791 without issue, leaving *Horatio* Earl of *Orford* his uncle and heir at law, and several of the trustees named in his will surviving; and that upon his death, *Robert George William Trefusis*, afterwards Lord *Clinton*, who was his next cousin and heir *ex parte materna*, wrongfully entered into the receipt of the rents and profits of the said moiety of the said manor and borough of *Ashburton*, and that he continued in such receipt until the time of his death; and that upon his death, on the 28th of *August* 1797, the defendant Lord *Clinton*, who was his eldest son and heir at law, entered into the receipt of the rents and profits of the same estate at *Ashburton*, and that he then was in such receipt, or in the possession of the said estate. The bill next stated, that *Horatio* Earl of *Orford*, by his will, dated the 15th of *May* 1793, after disposing of his freehold and leasehold estates in the counties of *Norfolk Essex* and *Middlesex*, and giving divers specific and pecuniary legacies, gave devised

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and bequeathed to his cousin *Henry Seymour Conway*, his heirs executors and administrators, all the rest and residue of his estate and effects real and personal, of which he then was, or should be at his death seised possessed interested in or entitled to, or over which he had a disposing power; and that the said *Henry Seymour Conway* having died in the lifetime of the testator, he, by a codicil to his will, dated the 27th of *December* 1796, appointed the plaintiff *Ann Seymour Damer* to be his residuary legatee and devisee in the room of the said *Henry Seymour Conway*; and after further stating, that *Horatio* Earl of *Orford* died soon after the date of his codicil without issue, leaving the plaintiff Marquis *Cholmondeley* his heir at law, and the plaintiff *Ann Seymour Damer* him surviving; and that some questions had arisen between the said plaintiffs respecting the will and codicils of the said *Horatio* Earl of *Orford*, and that they had agreed to share equally between them the residue of his real estate; and that they were advised that under and by virtue of the aforesaid conveyances and assurances, and particularly the limitations contained in the said deed poll of the 2d of *April* 1750, they *or one of them*, upon the death of the said *Horatio* Earl of *Orford*, became beneficially entitled to the said moiety of the said manor and borough of *Ashburton*; The bill stated, that at the death of the said *George* Earl of *Orford*, the said moiety of the said manor and borough was let upon leases for lives, and upon leases for years simply, and for years determinable upon lives, which leases respectively did not expire till long after the year 1796.

The bill further stated, that the plaintiffs had lately brought several actions of ejectment to recover possession of the said estate at *Ashburton*; and that doubts having been suggested, whether the legal interest therein was not vested in the surviving trustees named in the said codicil of the said *George* Earl of *Orford*, the said actions were brought upon the joint and several demises of the said

plaintiffs, and upon the demise of the said surviving trustees, with their consent and approbation; and after alleging, that the plaintiffs were advised, that if the legal estate in the said moiety of the said manor and borough passed by the said codicil of the said *George* Earl of *Orford* to the said surviving trustees, the same was then vested in them in trust for the said plaintiffs *or one of them*; and that Lord *Clinton* had caused himself to be named defendant to the said action of ejectment; the bill called for a discovery of the several matters aforesaid.

To this bill the defendant Lord *Clinton* filed a general demurrer, that the plaintiffs had not by their bill shewn any right or title to the discovery sought thereby. The demurrer was heard before the *Vice-Chancellor* on the 19th and 22d days of *December* 1818, and his Honour was pleased to overrule it. From the order overruling the demurrer Lord *Clinton* appealed.

Mr. *Heald*, Mr. *Pepys*, and Mr. *Seymour*, in support of the demurrer.

There are two grounds on which this demurrer ought to be allowed: First, that the title of the plaintiffs is alleged to rest upon an agreement which the law will not sanction. Secondly, that two plaintiffs cannot come into this Court stating titles which cannot possibly subsist together. With respect to the illegality of the agreement; it is not necessary to enter at large into the law upon that subject. The point was fully considered in the late case between these parties in the House of Lords, and the opinion expressed on that occasion is quite conclusive in our favour. Suppose Lord *Cholmondeley* had filed the bill alone, alleging the devise to Mrs. *Damer*, and that he had agreed with Mrs. *Damer* for her interest in the property,—could the bill have been supported? It would have been precisely the case, against which the statute 32 *H.* 8. *c.* 9. was intended to

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guard, the purchase by one party out of possession, of the title of another person also out of possession. If the illegality of the agreement is not decisive in favour of the demurrer, still the plaintiffs cannot be permitted to set up conflicting titles; the grounds of defence against the heir at law and the devisee are perfectly different. If the bill was filed by the devisee, the length of time would be a clear answer to her claim. If the heir at law set up a title, we could shew that the estates passed by the codicil: but when the heir at law and devisee claim together, there is no mode of pleading by which we can raise our defence against them. We cannot put in two pleas against two independent and different claims. Admitting that where a person has been out of possession for twenty years he may in some cases bring an action of ejectment, a court of equity will not favour the action; it is bound by the statute of limitations, and will give no assistance to rights which have been slept over for twenty years. On that ground also we contend that this bill cannot be supported.

The *Attorney-General*, Mr. *Shadwell*, and Mr. *Sugden* for the plaintiffs.

It has been contended on the other side, that on the face of this bill we shew a title that is illegal; a title, in one of the plaintiffs at least, acquired by champerty, or maintenance, or by the purchase of a pretended title. Now Lord *Coke* (*a*) thus defines what is champerty, and what maintenance: first, to maintain, to have part of the land or any thing out of the land, or part of the debt or other things in plea or suit, is called *campi partitio* or champerty; next maintenance is, when one maintaineth the one side without having any part of the thing in plea or suit. Champerty and maintenance therefore are, where a person not a party to the record supports the party to the

(*a*) Co. Litt. 368.

record, which is not in any sense the case now before the Court. In determining the question whether this is a purchase of a pretended title, the Court must consider, whether an information or an indictment could be maintained on the statute 32 *H.* 8. *c.* 9. Upon the facts appearing upon this record no such indictment could be maintained: it must be shewn that the seller has not been in possession a year before, and that he had a pretended right to a title. The *King* v. *Hill.* (*a*) Dyer 74. The evil against which the statute was intended to guard was this, that one man having no right to an estate, but only a pretended right, and not being able to prosecute his right, should sell such right to another person; but this is the case of two persons, it being doubtful which has the right, joining together in bringing one suit instead of two. When there are questions between two parties relative to rights which they claim under certain instruments, or under wills, it is perfectly competent for them to enter into an agreement respecting those rights, and such an agreement is not only legal, but might be enforced between the contracting parties in this Court. *Cann* v. *Cann*, (*b*) *Hobson* v. *Trevor*, (*c*) *Stapilton* v. *Stapilton*, (*d*) *Stockley* v. *Stockley*, (*e*) And not only may parties compromise their rights, but it has even been held, that parties may enter into an agreement in contemplation of a right which may afterwards devolve upon them, where neither party had any right at the time when the agreement was entered into. *Beckley* v. *Newland.* (*f*) For the purpose of this argument it must be assumed, that a question respecting the title has arisen between these parties, and there is nothing to prevent them from entering into a compromise for the purpose of avoiding litigation. Suppose that these lands were withheld by a tenant, or a mortgagee, and that Lord *Cholmondeley* and Mrs. *Damer* came into a court of

(*a*) Cro. Car. 233.
(*b*) 1 P. Wms. 723.
(*c*) 2 P. Wms, 191.
(*d*) 1 Atk. 2.
(*e*) 1 Ves. & Beames 23.
(*f*) 2 P. Wms. 182.

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law to enforce their rights; it is every day's practice in a court of law, that if an ejectment be brought, and it be doubtful whether the title be in the heir at law or devisee, that they may join in the action by having a demise from each, and you may recover on either as the case may be.

The LORD CHANCELLOR.

Supposing the agreement to be a lawful agreement, it would be an agreement, which would perhaps entitle you in moieties to the legal estate, or to the beneficial interest. Now if you look at the subsequent charges of the bill, after the statement that you have agreed to divide the estate, you go on to allege, not that the beneficial interest is in you according to the agreement, but that it is in you or one of you, and that you or one of you is entitled; Lord *Redesdale's* opinion, as declared in the House of Lords was, that a bill in equity with such an averment could not be supported. So when you come to the ejectment which proceeds amongst others on the demise of the trustees, the bill alleges not that the beneficial interest is in you, but in you or one of you. According to Lord *Redesdale's* opinion the allegation ought to have been, (provided the agreement is a legal one) that the trustees were trustees for both the plaintiffs, and not for one of them.

For the plaintiffs

It is averred that the parties have agreed to share equally between them the residue of the real estates. Supposing therefore that the agreement is a good and valid agreement, it sufficiently appears that both parties have a joint beneficial interest under it. The objection would have had its full force, if the bill had simply averred, that the plaintiffs or one of them had been entitled, and then that the trustees were trustees for them or one of them.

The existence of the leases saved the right of the plaintiffs down to the time of their expiration. In *Doe* v. *Danvers* (*a*) it was decided, that though a party was out of possession for more than twenty years, yet that the time would not run against him during the continuance of the lease; upon this simple ground, that no man by wrong can get my right, and therefore the payment of the rent to a person not entitled can never operate as a disseisin. If my tenant pays rent to another wrongfully, I am nevertheless in possession, though I do not choose to take advantage of the forfeiture, *Doe* d. *Onell* v. *Madox*. (*b*)

Mr. *Heald* in reply.

The question in this case is, not whether the agreement should be enforced between the parties, but whether it gives such a title as is good against one individual. We rest this case upon the short point, that here are two persons with opposite interests to each other converted into co-plaintiffs; there is no precedent of such a bill being supported. It would lead to this inconvenience, that if A. filed a bill, claiming a right which it was known he had not, and a demurrer was put in upon the ground, that by the statements of the bill it appeared that the title was in B., the bill might be amended, and B. made a co-plaintiff; and although it would appear upon the record that A. and B. had opposite interests, the Court would decree the estate to A., which would in effect be declaring that B. had no title at all; so that a party would obtain a decree in his own suit, though by the decree it would appear he had no title to the estate.

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The difficulty of maintaining a suit where there are two plaintiffs, A. and B., each asserting the title to be in him, is

(*a*) 7 East. 299. (*b*) Runnington's Ject. App. 458.

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this, that if the Court decides that A. is entitled, and the defendants do not complain, how is B. as a co-plaintiff to appeal from that decree. They remove that objection by saying, that although previous to the agreement the titles were in different persons, the agreement has made them tenants in common, and therefore that they have but one title between them.

For the defendants

We admit that if a person has a title, and agrees to let another in as tenant in common, they may sue together: but in that case it appears how they are tenants in common; here upon the face of the bill it is uncertain, whether Lord *Cholmondeley* claims under Mrs. *Damer*, or Mrs. *Damer* under Lord *Cholmondeley*. The present too may be considered as a case, in which we have a right to insist, that the plaintiffs are not entitled to a discovery, because it appears on the face of the proceedings, that we have been in the quiet possession of the property more than twenty years; and because, although the real owner may not be compelled to bring an ejectment before the expiration of the lease, it does not follow that this Court will assist him by discovery to bring that ejectment after twenty years have elapsed.

The LORD CHANCELLOR.

It has been argued that this is a case, in which the plaintiffs come into Court, stating, that the one or the other is entitled; and if that is the nature of the record, it is a record quite singular, and quite different from any I ever recollect; that two persons can come into this Court, and say the title is either in me or you; each contending it is in himself, and bring before the Court a defendant,—is this the course of the Court? The real question here is whether

Two persons averring that the title is in one or the other of them, and each contending that it is in himself, cannot join in a suit as co-plaintiffs. *Semble*.

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the record does put it in that way or not. It is true that it does put it in that way, so far as it alleges, that one or the other is entitled under a certain instrument: but the question is, whether it goes on to assert, that not only under that instrument, but under the agreement entered into by the parties, one or the other is entitled; or whether it makes the distinction, that one or the other is entitled under the instrument, but that both have acquired an equitable title under the agreement. If that distinction is made, the objection fails; and this is a bill brought upon a distinct title, because it asserts that though it is a legal title in one or the other, it has become subject to equitable claims in which both have a common interest. Another question here is, whether the record states a case, that falls within the principle of the great case in the House of Lords. The case of *Doe* v. *Danvers* is said to differ this case from that;—without having formed any opinion upon the case of *Doe* v. *Danvers*, I can only say, that I know there has been some grumbling as to its authority in the place to which this may go: but supposing that case to be quite right, I am not prepared to say that the sort of possession which will support an ejectment, is the kind of possession, which will authorize the holding that a bill of discovery will lie.

The LORD CHANCELLOR.

February 22. In this case there are several questions. It is a bill filed for discovery in aid of an action of ejectment, brought on the demise of Lord *Cholmondeley*, on the demise of Mrs. *Damer*, upon the joint demise of both; and likewise on the demise of persons represented to be trustees for them of the estate; and the point is, that to this bill, so framed, there is a demurrer, insisting that the plaintiffs on their own shewing are not entitled to any discovery in equity. Many points arise in the consideration of this

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case which it is not necessary now to discuss or determine.

First, we had the case argued upon the doctrine of champerty and maintenance, and as to savouring of those offences at the common law: how far equity would act upon the policy of the law in cases not strictly within its letter.

Secondly, on the form of the bill it was said, that Lord *Cholmondeley* and Mrs. *Damer* might be fairly stated on the bill itself to represent—not that they have a joint legal title, but at any rate only a joint equitable title—recollecting also that the manner in which the existence of that title is stated, is so cunningly devised, that no man can tell what the agreement is, out of which that joint interest can be said to have accrued. There are difficulties in supporting the bill in that view of it. There are other points also which arose in the former case of *Cholmondeley* v. *Clinton*: but, without adverting to them further, the ground on which I think the demurrer must be allowed is this,—

The title is stated on the bill as a title, in which there has been in one sense adverse possession for above twenty years; and I believe it was the intention of the House of Lords to state this, that where there has been adverse possession, not accounted for by some disability, as coverture or infancy, for twenty years, a court of equity ought not to interfere. That doctrine was resisted by urging, that in the bill it was mentioned that there were leases of the estate, which were unexpired till the year 1796; not that the lessees had not paid rent to the *Clinton* family, but it was insisted on the authority of some modern cases decided in the Court of King's Bench, that inasmuch as an ejectment might be brought after the period expired, provided it was brought within twenty years after the expiration of

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those leases, so by analogy this bill might be maintained in equity. It will be in the recollection of those who have read the judgment delivered in the House of Lords in the former case, that Lord *Redesdale* expressed very considerable doubt, whether the cases alluded to would be finally supported, if brought before the House of Lords. But putting the case as high as it can be put, that they could be supported, and intimating at the same time that my opinion is not expressed either one way or the other, nothing can be more clear than this, that notwithstanding those leases, Lord *Clinton*, according to the statement of this bill has been in adverse possession for above twenty years. It is impossible to deny that these parties might have filed a bill in equity during the whole time the leases were in existence. I am therefore of opinion, upon that point of possession, that these parties on their own statement are not entitled to any assistance in equity.

Demurrer allowed.

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Ex parte Sir JOHN and LADY NICHOLL. *March 1.*

THIS was a petition under the statute 56 *Geo.* 3. *c.* 60. praying, that a sum of 437*l.* 18*s.* 10*d.* 3 per Cent Consolidated Bank Annuities, which had been carried to the account of the commissioners for the reduction of the national debt, under the provisions of the above-mentioned act, might be transferred to the petitioner Lady *Nicholl*.

The stock in question stood originally in the name of *John Price*, who died in *December* 1817, having made his

The Court upon petition under the statute 56 *Geo.* 3. *c.* 60., will direct stock, which has been transferred to the sinking fund, to be re-transferred to the petitioners, where their title is clear, without any reference to the Master to ascertain who is beneficially entitled to the stock.

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will, and appointed *Jane Price* his widow sole executrix. *Jane Price* afterwards died; and upon her death, Lady *Nicholl* obtained administration *de bonis non*, with the will of *John Price* annexed.

The petition was first heard before the *Vice-Chancellor*, who directed a reference to the Master to enquire, who was beneficially entitled to the stock, and ordered that the same should be transferred into the name of the Accountant-General.

Mr. *Heald* and Mr. *Bligh* now mentioned the petition to the *Lord Chancellor*, stating, that it had become the practice in the *Vice-Chancellor's* Court, upon all petitions under this act of parliament, to make the order which had been pronounced in the present instance; and submitted that in a clear case there ought to be no reference to the Master.

The *Attorney-General* for the Crown.

The LORD CHANCELLOR thought, that it was quite sufficient in this case, to produce the probate and letters of administration with the will annexed, and ordered the stock to be transferred to the petitioners.

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March 4.

IN the month of *March* 1765, *Andrews Jelfe* died intestate, leaving a widow and eight children; and upon his death, letters of administration were granted to the widow, by whom the management of the family affairs was entrusted to the defendant *Smith*, who acted as trustee down to the year 1802, when the intestate's widow died, and continued in the receipt of part of the property of the intestate down to the month of *August* 1804. The accounts relative to the trust having been then only partially settled, differences arose between the parties, and it was agreed that the whole of the accounts should be referred to arbitration, and that the submission should be made a rule of the Court of King's Bench. Bonds of arbitration were accordingly entered into; and on the 31st of *May* 1805 the arbitrators made their award, by which they charged the defendant *Smith*, with an entire unbroken sum of 33,647*l.* 6*s.* 2*d.* as the balance due from him, and in full of all demands. The submission was made a rule of the Court of King's Bench in *Trinity Term* 1805. The property of the intestate at the time of his death, in part consisted of the sums of 5000*l.* and 6000*l.* 4 per cent stock, and of a sum of 5692*l.* 10*s.* cash, which was received by the defendant *Smith*, and was alleged to have been invested by him on the 4th of *September* 1766, in the purchase of 5500*l.* of the like stock. The defendant *Smith*, being examined before the arbitrators as a witness, with respect to these different portions of stock, stated, that the same had been disposed of by the sale of one portion, and the transfer of the remainder to the parties beneficially entitled, representing the portions so sold and transferred, as portions of the identical sums of stock, respectively stated to

Where accounts between trustee and *cestui que* trust are referred to arbitration, and the award is made a rule of a court of law under the stat. 9 & 10 W. 3., though there be fraudulent misrepresentation by the trustee to the arbitrators as to particular items of the account, a bill cannot be maintained by the *cestui que* trusts, after the time limited by the statute has elapsed, to set aside the award as to the items impeached, leaving it to stand as to the remaining items, the award upon the face of it being entire.

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have belonged to the intestate at the time of his decease, and to have been purchased after that time; and he produced his books of account as a verification of the fact. The arbitrators in making their award proceeded upon the statement made by the defendant; and the present bill was filed on the 22d of *April* 1806, by the five surviving children of the intestate, who were also entitled to the shares of his widow and deceased children; alleging, that the plaintiffs had discovered, that the account of the stock transactions given by the defendant was untrue, and that he had occasionally sold out the stock which belonged to the intestate at the time of his death, and used it for his own benefit, and had not invested the 5692*l.* 10*s.* cash in the manner alleged by him; and insisting, that the defendant, sustaining the character of a trustee, was bound to have disclosed the circumstances to the arbitrators, and that the plaintiffs would in that case have had an option, either to have had the account taken as a stock account, or to have charged the defendant with the full amount of the benefit made by the sale of the stock, in which latter case they would have been entitled to a much larger sum than was awarded to them. The bill did not seek to impeach the accounts taken between the parties generally, or to set aside the award *in toto*, but insisted that it ought to be opened with respect to the three items in question; and prayed, that an account might be taken of what was due from the defendant to the estate of the intestate *Andrew Jelfe*, in respect of the said 5692*l.* 10*s.*, and of the interest thereof at 5 per cent. from the 4th *September* 1766, or of the monies arising from the sale of the 4 per cent. annuities purchased therewith, in case any were purchased therewith, and of the monies arising from the sale of the 5000*l.* and 6000*l.* 4 per cent. annuities, and of the dividends of such several sums of 4 per cent annuities, and of the interest of the monies arising from the sale thereof, from the time the same were received, at the rate of 5 per cent per annum, and of what transfers

payments or other satisfaction had at any time been made to any person or persons entitled to the same in respect thereof; and that the defendant might be decreed to pay to the plaintiffs what should be found due on taking such account, and that they might be declared entitled to the same over and above the sums awarded to them.

The defendant by his answer submitted, that the award ought to be wholly binding and conclusive between the parties; but stated, that he had no objection to the whole of the award being set aside, and the accounts taken in the usual way under the direction of the Court, without any regard being had to the award, or to what the arbitrators had done.

The case on the part of the plaintiffs was substantiated by evidence, falsifying the account given by the defendant before the arbitrators, and shewing, that the sums of stock in question had been repeatedly sold out and transferred: but it was proved on the part of the defendant, that the facts upon which the award was sought to be impeached, were known before the award was signed, and that the plaintiffs afterwards accepted the whole sum awarded to them, before they made any attempt to disturb the decision of the arbitrators.

The cause was argued before his Honour the present Master of the Rolls, then *Vice-Chancellor*, in *Michaelmas Term* 1813, and the following judgment was given.

The *Vice-Chancellor*. (*a*) *26th Nov.* 1813.

Upon the merits of this case, there seems to be a very fair ground for reviewing this account as to the three items in question, inasmuch as there has been a concealment or

(*a*) *Ex relatione*.

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false representation with respect to those three items, by a trustee, who is bound to give a fair account to his *cestui que* trust of the money in his hands. But the difficulty which has always struck me as to the proceedings in this case, bears upon a question of great magnitude, namely, what are the grounds upon which this Court is to deal with awards and references under the statute 9 and 10 *William* 3. I have looked into the authorities to see, whether this Court is not completely barred from giving the relief prayed by a bill to rectify an award, in the case of a reference made under the statute, where the bill is filed after the time has elapsed, within which application is under the statute to be made for the purpose of setting aside the award, if that be the nature of the application. I have been led also to examine, whether an application can be made to a court of equity, when the submission to the award is made a rule of another court; and whether the application can be made by a bill to rectify and supply the award as to certain selected items, in which there has been misrepresentation and erroneous conclusion, leaving it to stand as to all the remainder of the items. A proceeding of that nature appears to me to be perfectly new: there is no instance in which such an application has ever been made; and it will be attended with great difficulty if this Court can entertain such a jurisdiction, and administer such relief.

It is now clearly settled, that the references under the statute of the 9th and 10th *William* 3. are to be governed by the statute, and the statute has transferred the jurisdiction, and given it altogether to the Court of which the submission to the award is made a rule, has prescribed in what cases, and within what period, if at all, the award is to be set aside. The principle which is to determine the Court in carrying into execution that very salutary and important act is clear and settled; it is fitting that it should be considered, whether there be any special ex-

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ception to it: but the general principle is, that where the parties have selected their own tribunal, a certain period of time shall be given, after which the award shall be final and conclusive. *Pedley* v. *Goddard* (*a*) is a leading authority upon the construction of the act: the question there was, whether upon an application for an attachment for non-performance of an award, the submission to which was made a rule of Court by virtue of the statute, it was competent to the parties to object to the award, for any illegality apparent upon the face of it, although the time limited by the statute for applying to the Court to set aside the award had expired. The distinction taken in that case is this, that if there is a palpable objection upon the face of an award, the proceeding to set it aside must be within the time limited; but that it is competent to the Court, after that time has elapsed, to attend to the objection, where an application is made to enforce the award by attachment, in the same manner as if an action is brought upon an award, on the face of which there is a palpable objection. If then it is not competent to the parties, after the period has elapsed, to apply under the statute to set aside an award, although an objection appears upon the face of it, certainly it is not upon any objection appearing extrinsic to it, either the circumstance of corruption or misconduct of the arbitrators, or fraud of the parties; it cannot be impeached in any case when the period has elapsed by any application under the statute to set it aside. The case of *Pedley* v. *Goddard* has ever since been followed in every court of justice, though in *Allardes* v. *Campbell* (*b*) the Court was divided upon the question, whether any jurisdiction attached where there was a reference under the statute; and though in *Braddick* v. *Thompson* (*c*) the Court of King's Bench, when unable to permit the party by pleading a matter dehors the award to impeach it, threw out an idea, that

Where there is a palpable objection upon the face of an award, the Court may refuse to enforce, but cannot set it aside, after the time limited by the statute has elapsed.

(*a*) 7 T. R. 73.
(*b*) Bunb. 265.
(*c*) 8 East. 344.

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they would allow a new rule to be framed, so as to permit the party to go to a court of equity upon the subject, it being still doubtful, whether, if they did apply, a court of equity would interfere. I take that point to be settled by *Nichols* v. *Chalie*, (*a*) and the still more recent case of *Gwinett* v. *Bannister*,(*b*) in which cases the *Lord Chancellor* has clearly decided, that the jurisdiction in matters of award referred under the statute, is altogether transferred by the statute to the court of which the submission is made a rule, and that awards of that nature must be regulated by the statute with respect to the period within which application must be made to the Court to set them aside. If that be so generally speaking, the question is, whether a bill can be filed to impeach an award in part to correct it in part, the submission to arbitration having been made a rule of a court of law. If the jurisdiction is a statutable jurisdiction, confined in the way prescribed by the statute, and the ancient jurisdiction of a court of equity is taken away in cases coming under the statute, the whole subject of the award must be dealt with entirely in the court to which the jurisdiction is given, and any other court has no jurisdiction over it. Then if upon any ground a party has a right to complain of the decision of the arbitrator,—upon what principle has he a right to come to any other court that has not a jurisdiction? It is said that fraud constitutes an exception; that it is against conscience for the party to insist upon such an award; and that therefore, though undoubtedly parties are limited in general, within the period limited by the statute, and to the court that has jurisdiction over the award, yet in a case like the present, where it is against conscience, and where the discovery could not be made in time, there ought to be an exception. It will not be necessary to decide that point now: but at the same time it becomes the Court to consider the difficulty which

The jurisdiction in matters of award, referred under the statute 9 and 10 W. 3., is altogether transferred to the Court of which the submission is made a rule; and awards of that nature must be regulated by the statute with respect to the period within which application must be made to set them aside. A case of fraud does not constitute an exception. *Semble.*

(*a*) 14 Ves. 265. (*b*) *Ibid.* 530.

would arise out of such a proposition. Suppose corruption was imputed to the arbitrators,—has the party in that case a right to apply to a court of equity, corruption being one of the cases in which it is expressly stated the party is to apply to the Court of which the submission is made a rule? Does subsequently discovered corruption transfer the jurisdiction? Why is not the party equally to apply to the equitable jurisdiction of a court of law upon the ground of subsequently discovered corruption?—One court has as much jurisdiction as another court; and there is no necessity for applying to a court of equity, supposing either court could in such case entertain jurisdiction. At the same time it is obvious, that if exceptions to the statute are to be permitted upon the ground of subsequently discovered corruption, all the evils will be let in which are meant by the statute to be prevented, the statute having given a time within which discovery of corruption shall be available. It is not, in my opinion, necessary to decide that question upon the present occasion, because, even if it be admitted that a party can in any case impeach an award after the period has elapsed, on the ground of newly discovered fraud or corruption, he is certainly bound to shew that it is a new discovery, and further that with diligence he could not have discovered it before—Can it be said, that throughout the whole period of time this case was before the arbitrators, these plaintiffs could not with due diligence have discovered in what manner this stock had been dealt with? This is not a case in which subsequent discovery is proved to have been made by the party: but on the contrary the discovery was made, in part at least, previous to the award; and at all events the plaintiffs might have applied to the Court within the time limited by the statute, on the ground on which they now complain. But that is not all the difficulty the plaintiffs have to contend with in the present case. This application is perfectly new. It is such an one as I never remember to have been made, even in due time, and to the proper

Where a party applies to set aside an award on the ground of newly discovered fraud, he is bound to shew that it is a new discovery, and that he could not with due diligence have made the discovery before.

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tribunal. Here is an award, which upon the face of it is perfectly good, final, and complete. It directs an entire sum to be paid; it does not upon the face of it distinguish, how much arises from one head, and how much from the other. Is it competent then to a party to set it aside in part, and to leave it to stand in part?—Can that be done in reference to an entire subject like the present? There are cases in which an award may be good in part, and bad in part; but those are cases in which the subject appears clearly capable of being separated, where for instance the arbitrator exceeds his authority in one subject, or proceeds to another which he has no power to award:—But was there ever a case heard of, in which it was said, that where all the items of an account were within the submission, and the arbitrators, having properly exercised their jurisdiction upon the subject, pronounced one entire sum to be due, and declared that upon payment of that sum all accounts should close, the award should be bad as to some of the items, which were not before the arbitrators in the view in which they were afterwards presented to the Court. In such a case the Court would have in the first place to analyze the entire sum awarded, to discover how much of it was composed of the items complained of, and to cut it down to a different sum. Suppose that to be done in the present instance, and so much to be taken off as arose from the mistaken conclusion of the arbitrators in respect of these three items, and that instead of 33,000*l.* 20,000*l.* was ascertained to be the remnant due,—How would it be possible to make out this compound account, partly under an award, and partly under the decree of the Court. It would be to substitute that which the arbitrators had no power to do, namely, to give 20,000*l.* in part, and to leave all the other items open. How is it possible to deal with an award in that manner? How could it be enforced by attachment as to the remaining sum of 20,000*l.* for the items not complained of? How could an action be brought upon the award to recover that? It would be sufficient to

An award may be good in part, and bad in part, where the subject is clearly capable of being separated: but not where all the matters are within the submission and the award is upon the face of it entire.

answer, there is no such award as one for 20,000*l.* in existence. In the next place it would be a decisive objection to it, that an award for 20,000*l.* in part would not be final, and could not stand. It is impossible then to let the award stand, as an award of particular items of an account, where the arbitrators have incorporated all into one entire sum, without stating upon the face of the award the manner in which they make up that sum; and the arbitrators having stated as the condition, that the award shall be final, it is impossible for the parties to take one part of that sum, and leave the account open as to the rest; they must make their election, and either seek to set aside the award *in toto*, or leave it as it is. Had they in the proper time applied to the Court, they might on the ground of fraud have impeached part of it, and that would have had the effect of impeaching it *in toto*: but it is impossible to separate such an award, to make it good in part, and bad in part, when it is entire upon the face of it. These are the difficulties that have impressed my mind; I have endeavoured most anxiously to discover some principle upon which I could declare that the plaintiffs were entitled to relief: but when the bill is to have an account taken of partial items, when it is filed in a Court that has not jurisdiction, when it is filed after the time limited by the statute has elapsed, and when the plaintiffs do not make out, that the fraud upon which they proceed, was discovered posterior to the time at which resort ought to have been had to a court of justice; I think it would be going beyond what has ever been done in any case, and lead to infinite mischief, if such an award could be disturbed in this Court: I am clearly of opinion therefore, that upon this ground, the relief prayed by this bill cannot be granted, and the bill must be dismissed.

The plaintiffs appealed from this decree; and the appeal was argued on the 16th and 17th of *March* 1822.

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Mr. *Horne* and Mr. *Shadwell* for the appellants.

It is clear that the defendant deceived the arbitrators by concealing the facts as to the stock which he sold out: the only question therefore is, whether the statute makes the award conclusive. This is not a case where we seek to set aside the award, we admit it to be good so far as it goes: but one part of the accounts has not been taken, and we desire to have that added. As a trustee, it was the duty of the defendant to have informed his *cestui que* trusts of all the circumstances. The suppression was a fraud which the statute cannot be intended to sanction. The statute enacts that the process for enforcing awards shall not be stopped except within a certain time: but that enactment does not apply to this case, because no process has issued; and if an attachment is applied for, the Court will consider the objections to the award, *Pedley* v. *Goddard*. (*a*) The statute then goes on to say how awards may be set aside, giving power on a summary application, but not confining by negative words the power of courts of equity to interfere upon a bill filed.

Mr. *Roupell* for the respondent contended, that the plaintiffs were barred by the award and statute; and cited *Gwinet* v. *Bannister*, (*b*) *Nichols* v. *Chalie*, (*c*) *Allardes* v. *Campbell*, (*d*) *Kampshire* v. *Young*, (*e*) *Fetherstone* v. *Cooper*, (*f*) *Chicot* v. *Lequesne*, (*g*) *Godfrey* v. *Boucher*. (*h*)

Mr. *Horne* in reply cited *South Sea Company* v. *Bumpstead* (*i*) and *Ward* v. *Periam*; (*k*) and insisted that the defendant, being bound as a trustee to disclose the facts, stood in a different situation from any other party.

(*a*) 7 T. R. 73.
(*b*) 14 Ves. 530.
(*c*) *Ibid.* 265.
(*d*) Bunb. 265.
(*e*) 2 Atk. 155.
(*f*) 9 Ves. 67.
(*g*) 2 Ves. sen. 315.
(*h*) 3 Vin. Abr. 139.
(*i*) *Ibid.* 140.
(*k*) 1 Eq. Cas. Abr. 91.

The LORD CHANCELLOR said, that the trustee and *cestui que* trust going to arbitration, put one another at arms' length like other parties, and could not be relieved, if they did not use due care in the proceeding; and desired that the Registrar's Book might be consulted as to the cases cited in the argument. (*a*)

(*a*) The following notes of the cases of *Ward* v. *Periam* and *Allardes* v. *Campbell*, and of the case of *Reynell* v. *Luscombe* referred to in the report of *Allardes* v. *Campbell*, were furnished to the *Lord Chancellor*.

WARD *v.* PERIAM.

[2 Eq. Cas. Abr. 91.]

The order on the hearing of this cause for further directions, on the 21st *April* 1721, is in these terms:—

This cause coming on the 20th day of *May* last, to be heard and debated, the scope of the plaintiff's bill being, to set aside the award dated the 18th day of *December* 1718, made by the defendants *Walker* and *Lloyd*, as arbitrators between the plaintiff and the defendant *Periam*, touching several matters of account depending between them, and touching which there was a former suit depending in this Court between the said plaintiff and defendant *Periam*, and that the defendant's proceedings at law on the award bond entered into by the plaintiff might be stayed, and said bond be delivered up to be cancelled. The said plaintiff by his bill charging, that by the decree in the former cause, an account being directed to be taken by Mr. *Browning*, then one of the Masters of this Court, the defendant *Periam* found there would be a great balance due thereon to the plaintiff, and applied to him that they might settle the account between themselves, to which the plaintiff agreed; But they differing between themselves on some items, it was agreed to refer the matters to the arbitration of said defendants *Walker* and *Lloyd*, and of one *John Jenkins*, or of any two of them, and that said *Walker* and *Lloyd* proceeded with great partiality, and awarded the plaintiff to pay the defendant 324*l.* 19*s.* 3½*d.* although they ought to have awarded the defendant *Periam* to have paid the plaintiff 100*l.* and upwards, besides costs of suit; and that after said award made, the defendant *Periam* assigned the benefit thereof to the defendant *Mitchell*, in trust for the defendants *Dally Selleck* and *Tassell*; since which

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AURIOL v. SMITH.

March 4.

The LORD CHANCELLOR.

When this case came before Sir *T. Plumer*, he was of opinion, that the circumstance of the award having been

the defendant *Periam* became bankrupt, and his effects had been assigned to the defendant *Lloyd*, who put the award bond entered into by the plaintiff in suit; whereto the defendants *Periam Lloyd* and *Walker* insisted, that said award was just, and was fairly made; and the defendant *Lloyd* insisted, that the same ought not to be set aside, and the rather for that the plaintiff had himself caused the award to be made a rule of the Court of King's Bench; and though he afterwards caused the said Court to be moved that the same might be set aside, could not prevail therein. Whereupon and the pleadings in the cause being then opened, and upon hearing of the bond of submission dated the 17th day of *October* 1718, the rule whereby the said submission was made a rule of the Court of King's Bench, the rule for the defendant *Periam* to shew cause why the said award should not be set aside, and the rule made upon his shewing cause to discharge the last rule, and the act of parliament for determining differences by arbitration, read, and what was insisted on by the counsel for all the said parties; his Lordship thought fit, and so ordered, that it should be referred to Mr. *Lightborne*, one of the Masters of this Court, to state what proceedings there had been in the Court of King's Bench, and how far the defendants had insisted on those proceedings by their answers. In pursuance whereof the said Master made his report, dated the 25th *November* 1720, and thereby certified, that on the 11th *February* in the fifth year of his Majesty's reign, on the plaintiff *Ward's* motion, a rule of the Court of King's Bench was made, that the submission of the matters in difference between him and the defendant *Periam* should, according to the form of the statute, be entered and made an order of the same Court; and on the same day, of the plaintiff *Ward's* motion, another rule was made of the same Court, on reading the affidavit of the plaintiff *Ward* and Mr. *John Jenkins*, whereby the first day of the then next term was given the defendant *Periam*, to shew cause why the arbitration between the parties lately made should not be made void; and that on the 25th day of *April* following, the defendant *Periam* coming to shew cause, after some considerable debate of the matter, the Court was divided in opinion, two judges against two judges, as to the setting aside said award, and

made a rule of the Court of King's Bench, might have been a bar to a bill to set aside the award altogether, and that *a fortiori* it was an answer to a bill to set aside the award in part. The case was argued in two

thereupon a rule was made that said former rule should be discharged, and said master by his report further certified, that after said rule of 25th *April*, one or more motions were made in the King's Bench on the defendant *Perian's* behalf, for an attachment against said *Ward* for non-performance of said award, but that no rule was thereupon made.

And the cause coming this present day to be heard before his Lordship for further directions, in the presence of counsel learned on all sides, whereupon, and upon the debate of the matter, and hearing said Master's report, the decretal order dated the 13th *November*, 4th *Georgii Regis*, with defendant *Walker's* answer, and the proofs taken in this cause, read, and what was alleged by the counsel for all said parties, his Lordship declares, that it appears that said award was unfairly obtained; and doth therefore order and decree that the same be set aside, and that the defendant *Lloyd* do acknowledge satisfaction in the judgment obtained on the award bond, and that the defendant *Walker* do pay unto the plaintiff his costs at law, and of this suit, to be taxed by said Master.

ALLARDES *v.* CAMPBELL.

[Bill filed *Mich. Term*, 2 *Geo.* 2. Roll. 146.—Bunbury 265.]

The bill in this cause stated, that the parties reciprocally entered into bonds in the penalty of 1000*l.* conditioned for the performance of the award of two arbitrators, to whom they had agreed to refer all matters in difference between them, or if the two arbitrators disagreed, of such umpire as they should appoint, with a clause that the award or umpirage should be made a rule of the Court of King's Bench. It stated that the arbitrators made no award, but appointed an umpire; that he made his award, directing the plaintiff to deliver up the note of hand on which he founded his demand against the defendant, but that he made such award without hearing plaintiff or giving him an opportunity to produce his vouchers or proofs; that he had informed the plaintiff that he did not mean his award to be final, but that the same should be revised if the plaintiff was dissatisfied; and that the de-

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ways. It was insisted by the defendant, that this Court has no authority to set aside an award made a rule of a court of law under the statute of *William*. And for this purpose were cited several cases: *Allardes* v. *Camp-*

fendant also agreed, that if the plaintiff was dissatisfied there should be a further reference, and new bonds of reference should be entered into. The bill charged, that the umpire misconducted himself, that the award was unwarrantable, framed on untrue suggestions, and got by surprize, and without due method had, or good consideration taken by the umpire. It stated that the defendant had made the submission a rule of the Court of King's Bench, and was proceeding against plaintiff on an attachment issued out of that Court; and it prayed for an account between the parties, and for an injunction to restrain the defendants proceeding on the bonds of submission, or by any rule or process of the King's Bench.

The defendant pleaded, and set out the award at length, also a rule of the King's Bench making the submission a rule of that Court, and stated that he moved the King's Bench for an attachment against plaintiff for non-performance of the award, that plaintiff then obtained a rule for defendant to shew cause why the award should not be set aside, and that that rule was upon hearing counsel on both sides discharged. He then stated the statute of *William and Mary*, and averred that the award was not procured by corruption or any other undue means, and that the umpire did not misbehave himself; that the award was made absolutely and without any condition as to the plaintiff's being satisfied with the same; that no complaint was made to the King's Bench, before the last day of the term after the award made, that the umpire had misbehaved; whereby the award was conclusive, and not liable to be impeached in any court of law or equity; that the plaintiff had exhibited a bill in Chancery for relief, to which the defendant had pleaded, and his plea was allowed, and the bill since dismissed for want of prosecution, and the defendant therefore pleaded the said statute of *Wm. & Mary*, and the other matters aforesaid in bar of all discovery and relief sought by the bill.

This plea was upon argument ordered to stand for an answer, with liberty to the plaintiff to except, exceptions were taken, and a long answer put in: but upon search made it does not appear that the cause was ever heard.

bell, and two cases before me,—*Nichols* v. *Chalie*, and *Gwinett* v. *Bannister*; in the latter of which cases, I consulted Lord *Ellenborough*, who was of opinion, that the statute was imperative upon a court of equity, as well as a court of law. Supposing these authorities un-

REYNELL *v.* LUSCOMB and PERROTT.

[Bill filed *Trin. T.*, 9 *Geo.* 1. Decree 2 *May* 1727. Roll. 138.]

In this case it was found necessary to refer to the original records in the Exchequer at *Westminster*.

The bill set forth a submission to arbitration of differences between *Reynell* and *Perrott*, by bonds which both entered into, with a clause that either might move to have the submission made a rule of the Court of King's Bench. It stated the award made by the arbitrator, that the defendant unduly obtained the same, and to defeat the plaintiff of his legal remedy, and to deprive him of an opportunity of making a legal complaint of the corrupt practices aforesaid, neglected to make the submission a rule of the Court of King's Bench, till it was too late for plaintiff to apply to the Court to set aside the award according to the directions of the statute, that the plaintiff was thus remediless by the rules of law, by the defendants' contrivance, and therefore the prayer was, that the award might be set aside, for an account, and for an injunction to stay the defendants' proceedings at law.

The answer denied each individual act of complaint, and improper conduct in the arbitrator, charged in the bill, and denied that any contrivance had been used by the defendant, to prevent the plaintiff's motion in the King's Bench to set aside the award, and alleged that on the contrary the plaintiff practised on the subscribing witnesses of the bonds of submission, to prevent their making an affidavit of the execution, which was necessary in order to their being made a rule of Court, that the defendant was in consequence much delayed in making this submission a rule of Court, but that the plaintiff might, after this was done, have moved the Court to set aside the award, and in fact did send some affidavits to London in order to a motion being made, but did not make any.

The cause being prosecuted to issue, witnesses were examined; and upon the hearing the bill was dismissed with costs.

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touched, it was contended by the plaintiffs, that there had been fraud on the part of this trustee, that when this matter was before the arbitrators, it was his duty to have stated to them what he had done, and that his having withheld the information was fraud; And it was insisted, that an award obtained by fraud could stand no higher than a judgment obtained by fraud; and as a judgment obtained by a fraud was a nullity, an award obtained by fraud was a nullity. The first answer that the *Master of the Rolls* gives to this argument is, that when parties refer their differences to an arbitrator, they put themselves at arms' length from each other, and that the plaintiffs were at liberty to ask the defendant all manner of questions. A second answer is, that though the argument might have been good, if the bill had been to set aside the award *in toto*, it is a different thing, when one entire sum has been awarded, to come upon this principle to correct the award as to part only. A third answer is, that the plaintiffs, without putting any question to the defendant, might have discovered the truth; and it was proved that before six months had expired the fact was known, and yet instead of applying to set aside the award within the time appointed by the statute, they went on to take the whole benefit of the award for the entire sum; and having done so, at length filed this bill to set aside the award in part. The *Master of the Rolls* reasons also in this way:—You could not bring an action for part of an award, nor could you have an attachment for part; for then the objection would hold good at law, that the award in that state is not final. On these and other grounds, I feel myself unable to struggle against this decree; and therefore, though not without reluctance, I affirm it.

Decree affirmed.

REPORTS

OF

CASES

ARGUED AND DETERMINED

IN THE

HIGH COURT OF CHANCERY.

COMMENCING IN THE

SITTINGS BEFORE MICHAELMAS TERM,

4 Geo. IV. 1823.

1823.

April 10.

Ex parte TOWN, in the Matter of ALCHIN.

The Court will not direct a reference to the Master as to the reduction of rent upon the petition of a tenant.

THIS was the petition of one of the tenants of a lunatic's estate, praying a reference to the Master to enquire whether it was proper that any reduction should be made in his rent.

The LORD CHANCELLOR desired it to be understood, as a general rule, that he would not make the order which was prayed, upon the petition of the tenant. (*a*)

Petition dismissed with costs.

(*a*) Upon a similar petition on the preceding day the *Lord Chancellor* observed, that in future every application for a re-

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Ex parte Town.

Mr. *Horne* for the petition.

Mr. *Garratt* for the committee.

Mr. *Sugden* for the next of kin.

duction of the rent of a lunatic's estate must be made by the Committee, and that the Master should in such cases always be directed to enquire, whether it would not be more for the benefit of the lunatic's estate that the tenant should give up his lease, than that his rent should be reduced. Ex parte *West*.

April 16—24.

JAMES HEAD *v.* MARY HEAD.

Where personal access between husband and wife is established, sexual intercourse is to be presumed; and the presumption must stand till rebutted by clear and satisfactory evidence.

THIS was a motion for the new trial of an issue, directed by the *Vice-Chancellor* upon the question, whether the plaintiff was the legitimate child of *William Head*.

The following facts were proved at the trial; That *William* and *Elizabeth Head* intermarried on the 9th of *November* 1795, and that disagreements having arisen between them, in consequence of the husband's habitual drunkenness, a separation took place in *June* 1797; That in *November* 1797, *Elizabeth Head* went to reside at the house of her uncle, *Thomas Randall*, who had a son, *James Randall*, living with him, and that *William Head* was in the habit of visiting his wife during her residence at *Thomas Randall*'s house; That upon the occasion of the last interview between them, which took place in *July* or *August* 1798, they were alone in a kitchen for some time, and that *Elizabeth Head* afterwards became pregnant, and left Mr. *Randall*'s; That on the 7th of *May* 1799 the

plaintiff was born, and was baptized by the name of *James*, the son of *William* and *Elizabeth Head*. That *William Head* died on the 30th of *August* 1800, and that in 1806 *Elizabeth Head* intermarried with *James Randall*, and had afterwards another child *Francis*; It was also proved, that after the marriage of his mother, the plaintiff was sent to school by the name of *James Randall*, and that he had subsequently used, and been known by that name, but there was no evidence of any familiarity having passed between *James Randall* and *Elizabeth Head*, up to the time of her leaving the house of *Thomas Randall*.

The new trial was moved for on the ground of a misdirection by Mr. Justice *Burrough*, before whom the issue was tried, who had laid down the law to the Jury, in the language of Lord *Ellenborough* in the case of *The King* v. *Luffe*, (*a*) the effect of which was, that where a child is born of a married woman, the husband is to be presumed to be the father of it, unless there be evidence to shew the absolute physical impossibility of the fact.

The motion had been made before the *Vice-Chancellor*, and refused; and the same line of argument was adopted in support of the motion, which had been urged in the Court below.

Mr. Serjeant *Lens* and Mr. *Pepys* for the motion.

Mr. *Heald* and Mr. *Phillimore* against it.

The LORD CHANCELLOR.

If I rightly understand that case of *The King* v. *Luffe*, I take it directly to establish no more than this, that if a

(*a*) 8 East. 193.

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man be proved to have had sexual intercourse with his wife, yet still if it can be shewn that it was impossible that the child of the wife should be his child, it is competent to a party, notwithstanding sexual intercourse between the husband and wife be proved, to establish by evidence the impossibility that such sexual intercourse could bring the child into existence. There is no denying that in what fell from the Judges in that case, there are very strong passages to shew, that beyond that they did not mean to determine, how far the old rule of law, as to the husband's being within the four seas, was or was not to be affected.

The case of the *Banbury* Peerage was decided in the House of Lords after very great consideration, and upon that occasion some questions were put to the Judges. Now it is well known, that the questions proposed to the Judges by the House of Lords, though made to approximate so nearly to the questions to be determined, as to enable the House to form a judgment on the case actually before it, cannot be the very questions which the House is called upon to decide. The answers given by the Judges therefore, although entitled to the greatest respect, as being their opinions communicated to the highest tribunal in the kingdom, are not to be considered as judicial decisions, but in that case of the *Banbury* Peerage, I take them to have laid down, so as to give it all the weight which will necessarily travel along with their opinion, although not a judicial decision, that where access according to the laws of nature, by which they mean, as I understand them, sexual intercourse, has taken place between the husband and wife, the child must be taken to be the child of the married person, the husband, unless on the contrary it be proved, that it cannot be the child of that person. Having stated that rule, they go on to apply themselves to the rule of law where there is personal access, as contradistinguished from sexual inter-

course, and on that subject I understand them to have said, that where there is personal access, under such circumstances that there might be sexual intercourse, the law raises the presumption that there has been actually sexual intercourse, and that that presumption must stand, till it is repelled satisfactorily by evidence that there was not such sexual intercourse. What is satisfactory evidence that there was not such sexual intercourse is a question which may be put in two points of view; First, is it meant that it must be proved, from circumstances which took place at the time that that personal access which might or might not give an opportunity of sexual intercourse, was had, or by the evidence of persons present, that sexual intercourse did not take place? or secondly, that you are to go into all the evidence as to the conduct of the parties prior to the interview in which personal access was had, and their conduct after that interview, in order to satisfy yourself, by the evidence of circumstances both previous and subsequent to the interview, what did or did not pass when that interview was had. Whenever it is necessary to decide that question great care must be taken, regard being had to this, that the evidence is to be received under a law, which respects and protects legitimacy, and does not admit any alteration of the *status et conditio* of any person, except upon the most clear and satisfactory evidence. It does not appear to me to be necessary now to ascertain what is the actual rule of law upon the subject; upon my recollection of the *Banbury* Peerage case, it was the opinion of the Judges, that where personal access is established, sexual intercourse is to be presumed, and that that presumption must stand, till done away with by clear and satisfactory evidence, whether that evidence apply directly to the period at which personal access was proved, or whether it may be called satisfactory, if it apply not to that period, but to antecedent and subsequent periods, in one way or other the rule must be established.

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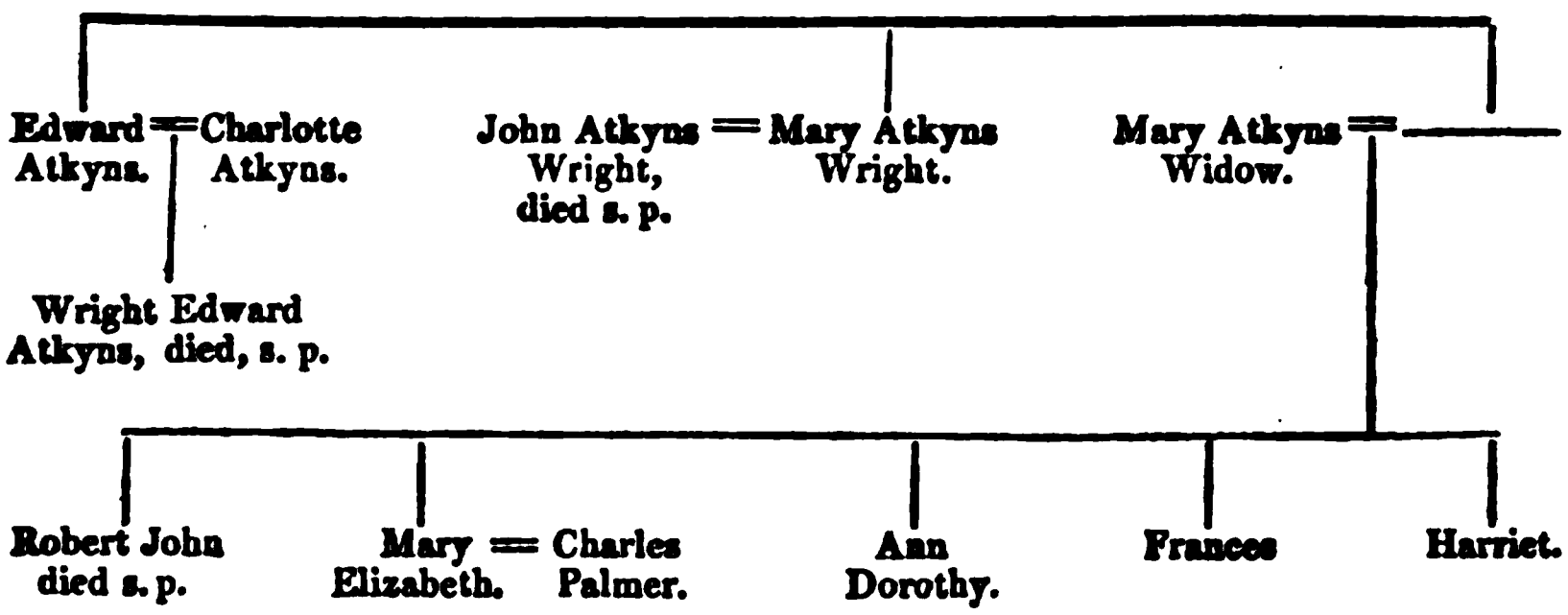
Miscarriage of a Judge in directing a Jury, is not a ground for a new trial, if looking at the whole evidence and the address of the Judge to the Jury the conscience of the Court is satisfied.

The LORD CHANCELLOR then observed upon the doctrine of Courts of Equity as to new trials, that if evidence, which ought to have been received, has been refused, or evidence, which ought to have been refused, has been admitted, or if in some instances the Judge can be shewn to have miscarried in his directions to the Jury, the Court will not grant a new trial, if looking at the whole evidence before the Jury, and the address of the Judge to the Jury, its own conscience is satisfied; and concluded by remarking, that if the Jury upon the evidence had found it a case of illegitimacy, he should have granted a new trial, and that it would be dangerous beyond measure for the Court to say, that such evidence as was given at the trial, was evidence to repel or break down the presumption of law.

New Trial refused.

Pedigree,

(Referred to in the following Case.)



BETWEEN MARY ATKYNS WRIGHT, Widow; ARTHUR EDWARD HOWMAN, Clerk; CHARLES PALMER Esquire, and MARY ELIZABETH his Wife, late MARY ELIZABETH ATKYNS; ANN DOROTHY ATKYNS; and MARY ATKYNS, Widow, ... PLAINTIFFS;

AND

CHARLOTTE ATKYNS, Widow; ELIZABETH BERNEY; THOMAS TRENCH BERNEY; FRANCES ATKYNS; and HARRIET ATKYNS, . . DEFENDANTS. *April* 17, 19, 21, 26.

Devise to A. and her heirs for ever, in the fullest confidence that after her decease she will devise the property to my family; A. is tenant in fee.

Where a decision which is to bind others, can only be made hereafter, it is the duty of the Court, in the mean time to preserve the property in such a state, that when it is made out who are the objects of favourable decision, they may have the benefit of it.

The Court therefore refused to interfere by injunction to restrain A. from cutting down timber, upon a bill filed by persons claiming to be interested under the foregoing devise after the death of A., but ordered that A. should be at liberty to cut the timber, in a husbandlike manner, as tenant in fee, giving security for the value, or bringing the value into Court.

WRIGHT EDWARD ATKYNS, the only son of the defendant *Charlotte Atkyns*, made his will in the following form:—I, *Wright Edward Atkyns* give

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devise and bequeath, all my manors messuages farms lands tenements advowsons and hereditaments, as well leasehold, as freehold and copyhold, or of whatever tenure or tenures the same be, situate in *Kettering lane*, and elsewhere in the county of *Norfolk*, and all other my real estate whatsoever and wheresoever, and of what tenure or tenures soever, unto my dear mother *Charlotte Atkyns*, and her heirs for ever, in the fullest confidence that after her decease she will devise the property to my family; and I do hereby subject and charge the aforesaid premises, to and with the payment of all such just debts as I shall owe at the time of my decease; and I do hereby give and bequeath to my aforesaid dear mother *Charlotte Atkyns*, all my goods chattels and personal estate for her own benefit, after payment of my debts, funeral expenses, the expenses of proving this my will, and all expenses incident to the due execution thereof; and I appoint the said *Charlotte Atkyns* sole executrix of this my will.

The former suit of *Wright* v. *Atkyns* (*a*) was instituted by *John Atkyns Wright*, the uncle and heir at law of the testator, in which suit, after alleging, that as the personal representative of *William Wright* and *Mary Wright* respectively, he had become an incumbrancer upon the estates devised by the will of the said *Wright Edward Atkyns*, the legal fee in those estates having been conveyed to Sir *James Graham*, upon trust to secure 2700*l.* due to the said *William Wright*, and the equitable fee having been vested in him the said *John Atkyns Wright*, upon trust to sell for the payment of debts, and amongst others, of a debt of 1000*l.* due to the said *Mary Wright*, he insisted, that he was entitled to have part of the estates sold for the payment of his incumbrances, and he raised the question, whether the said *Charlotte Atkyns*, who was a defendant in the suit

(*a*) 17 Ves. 255. Coop. Chan. Cas. 111. 19 Ves. 299.

as the devisee and executrix of the said *Wright Edward Atkyns*, was tenant for life, or tenant in fee, of the estates devised to her, by suggesting, that in order to determine how far those estates were to be burthened with both the principal and interest due to him the said *John Atkyns Wright*, it was necessary to decide, whether the said *Charlotte Atkyns* was bound to keep down the interest, a question which depended upon the extent of her interest in the estates.

By the decree pronounced by the late *Master of the Rolls*, Sir *William Grant*, on the hearing of the aforesaid suit, on the 13th of *July* 1809, it was declared, that the said *Charlotte Atkyns* was only tenant for life of the estates devised by the will of the said *Wright Edward Atkyns*, and that the said *John Atkyns Wright* was entitled to raise by sale of the said estates, what should be found due to him for principal, and interest accrued at the time the said *Charlotte Atkyns* took possession thereof, and that what should be found due for interest accrued since the said *Charlotte Atkyns* took possession, ought to be answered by her personally; and it was ordered, that what should be found due for principal and interest to the time the said *Charlotte Atkyns* took possession of the said estates, should be raised by sale accordingly.

After the decree of the *Master of the Rolls*, an injunction was granted by the *Lord Chancellor* to restrain the defendant Mrs. *Atkyns* from cutting down timber on the estates, (*a*) and his Lordship subsequently affirmed his Honour's decree. (*b*)

An appeal having been presented to the House of Lords, by the defendant *Charlotte Atkyns*, from the decree of the *Master of the Rolls*, affirmed by the *Lord*

(*a*) Coop. Chan. Cas. 111. (*b*) 19 Ves. 299.

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Chancellor, and from the order by which the injunction was awarded; their Lordships were pleased to reverse the original decree, and the decree of affirmance, so far as they declared that the said defendant was only tenant for life of the estates therein mentioned, and all directions consequent thereupon, and they also reversed the order for the injunction, so far as the same was founded on the aforesaid declaration, with liberty to the said defendant to apply to the Court of Chancery, as she should be advised, touching such injunction, as awarded on any other ground.

Part of the estates having been sold, pending the appeal from the decree at the Rolls, and the monies arising from the sale having been applied in payment of the principal and interest directed to be raised by the decree, the injunction in the former suit was immediately after the reversal of the decree in the House of Lords, dissolved by the *Lord Chancellor*, upon the motion of Mrs. *Atkyns*, supported by an affidavit, that the principal interest and costs due to the said *John Atkyns Wright* in respect of his incumbrances, had been fully paid and satisfied.

The present bill was filed for the purpose of obtaining a fresh injunction, and after stating to the effect hereinbefore set forth, it proceeded to state, that the said testator *Wright Edward Atkyns* died in the month of *November* 1804, leaving the said *John Atkyns Wright* his uncle and heir at law, and that upon the death of the testator, the defendant *Charlotte Atkyns* entered into possession of the manors, and freehold and copyhold hereditaments, devised by his will; but that the testator was not at any time during his life possessed of any leasehold estates whatever.

The bill then stated, that the said *John Atkyns Wright* by his will, dated the 7th of *June* 1814, devised all his real estates whatsoever and wheresoever, with the ex-

ception of certain estates therein specified, to the plaintiff *Arthur Edward Howman* and his heirs, to the use of his the testator's wife, the plaintiff *Mary Atkyns Wright* for life, with remainder, (after and subject to certain uses in favour of the testator's nephew *Robert John Atkyns* and his children, which failed of taking effect;) to the use of his the testator's niece, the plaintiff *Mary Elizabeth Palmer* for life, with remainder to the use of the plaintiff *Arthur Edward Howman* and his heirs during her life, in trust to preserve contingent remainders, with remainder to the use of the first and other sons of his said niece successively in tail male, with remainder to the use of all the daughters of his said niece as tenants in common in tail general, with remainder to the use of his the testator's niece the plaintiff *Ann Dorothy Atkyns* for life, with the like limitations in remainder in favour of her sons and daughters in tail, with the ultimate remainder to the use of his own right heirs for ever.

The bill next stated, that the said *John Atkyns Wright* died on the 5th of *March* 1822, leaving the plaintiff *Mary Atkyns* his sister and heiress at law, and that there was no issue of the plaintiffs *Mary Elizabeth Palmer* and *Ann Dorothy Atkyns*, and that the plaintiff *Mary Atkyns* therefore claimed to be entitled to the estates devised by the will of the said *Wright Edward Atkyns*, for the first estate of inheritance therein, as the heiress at law of the said *John Atkyns Wright*, under the ultimate limitation contained in his will. It was further alleged by the bill, that the plaintiff *Mary Atkyns* was the person then answering the description of heir at law of the said *Wright Edward Atkyns*, and that she claimed to be entitled to the aforesaid estates in that character also.

After further stating certain indentures of lease and release, dated respectively the 2nd and 3d of *July* 1821, by which the estates devised by the will of the said

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Wright Edward Atkyns, were conveyed by the said defendant *Charlotte Atkyns*, for all her estate and interest therein, to the said defendants *Thomas Trench Berney* and *Elizabeth Berney*, upon certain trusts therein mentioned for securing to the said last named defendants, several sums of money due to them respectively, and subject thereto, upon trust for the said defendant *Charlotte Atkyns*, her executors administrators and assigns; and which said indentures contained a power for the said defendants *Thomas Trench Berney* and *Elizabeth Berney* to fell all such timber upon the said estates, as could be lawfully felled by the said defendant *Charlotte Atkyns*; the bill charged, that the defendant *Charlotte Atkyns* took only a beneficial estate for life in the estates devised by the will of the said *Wright Edward Atkyns*, with remainder in fee to *John Atkyns Wright*, the heir at law of the said *Wright Edward Atkyns* at the time of his decease; and it further charged, that the legal fee in the aforesaid estates was then vested in Sir *James Graham*; and that if the said *Charlotte Atkyns* should be considered as taking an equitable estate of inheritance therein, yet that subject to a beneficial life interest, she must be considered as a trustee of the inheritance, for the said *John Atkyns Wright*, and those claiming under his will, or for the person who should answer the description of the heir at law of the said *Wright Edward Atkyns* at the time of her decease, the plaintiff *Mary Atkyns* being the person then answering that description.

The bill then adverted to the circumstance, that the defendant *Charlotte Atkyns* might be considered as having had a power to devise the estates, and charged, that she could not under such power have devised the same to any person but the said *John Atkyns Wright*, the heir at law of the testator *Wright Edward Atkyns* at his decease, and that in the events that had happened her power of devising was gone, and that the plaintiffs,

and those who might thereafter claim under the will of the said *John Atkyns Wright* ought to be considered as entitled to the estates, subject to the life interest of the said *Charlotte Atkyns;* and upon the supposition, that the power of devising might be considered as still existing; the bill charged, that under such power the defendant *Charlotte Atkyns* could not devise the estates to any person, but the person answering the description of the heir at law of the said *Wright Edward Atkyns*, at the time of her decease, and that the plaintiff *Mary Atkyns* was the person then answering that description.

The bill further charged, that although the defendant *Charlotte Atkyns* should be considered as having a power to devise the estates, either to the person who might answer the aforesaid description, or to any person comprehended in the popular sense of the word *family*, yet that in default of and until appointment, the inheritance of the estates must be considered as having vested in the said *John Atkyns Wright*, either as the person designated to take under the will, in default of and until appointment, or by way of resulting trust, and as having passed by the will of the said *John Atkyns Wright;* or that such inheritance must be considered as vested in the plaintiff *Mary Atkyns*, as the person then answering the description of the heir at law of the said *Wright Edward Atkyns.*

After further charging, that the plaintiff *Mary Atkyns* had four children, the plaintiffs *Mary Elizabeth Palmer* and *Ann Dorothy Atkyns*, and the defendants *Frances Atkyns* and *Harriet Atkyns;* and that the said plaintiff *Mary Atkyns*, and her said four children, were the only persons of the family of the testator *Wright Edward Atkyns*, on his father's side, then in existence; and stating, that the defendants had actually cut down a large quantity of timber, and threatened to cut down all the

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timber standing upon the estates; the bill prayed, that an account might be taken of the timber cut down by the defendants, and that they might be decreed to make good the value thereof, and for an injunction to restrain them from cutting down any more timber or committing any other waste upon the premises.

The *Attorney-General* Mr. *Wetherell* Mr. *Shadwell* and Mr. *Lynch* moved for the injunction.

Where property is in dispute between two contending parties, this Court will interfere for the purpose of preserving it, till the question of right can be determined. It is unnecessary, for the purpose of this motion, to enter into a detailed argument upon the construction of this will: the injunction must be granted, if the Court is satisfied, that there is so much doubt upon the instrument, that the property ought to remain in its present state till the hearing of the cause. The heir at law has a right to call upon the Court to preserve the property, either upon the principle laid down in *Morice* v. The *Bishop of Durham*, (*a*) that if a testator declares an intention to raise a trust, and the trust is too general and undefined to be carried into execution, the heir at law must take; or upon the ground that he has a title, as the person pointed out by the general description "my family," according to the authority of *Chapman's* case, (*b*) *Counden* v. *Clerke*, (*c*) *Crossley* v. *Clare*. (*d*) If Mrs. *Atkyns* be considered as having a power to devise these estates, either the heir at law of the testator, or the persons answering the description of his family in a popular sense, all of whom are before the Court, must have a vested interest, subject to the power; and all the cases establish the proposition, that where there is an estate

(*a*) 10 Ves. 522.
(*b*) Dy. 333.
(*c*) Hob. 29.
(*d*) Amb. 397.

for life, with a power of appointment, and interests vested, subject to be divested by the exercise of the power, the persons having those vested interests, have a right to call upon this Court to secure the property; *Hands* v. *Hands*. (*a*) The refusal of the Court to grant the injunction, will be tantamount to a decision that Mrs. *Atkyns* has an unlimited property in the timber. We rest our case, not upon the title of the plaintiffs only, but upon the ground, that there is a question to be discussed in the cause, and that the Court will take care, that in the mean time the rights of the parties shall not be prejudiced.

Mr. *Hart* and Mr. *Preston*, for the defendant *Charlotte Atkyns*.

Mr. *Sugden* and Mr. *Morley*, for the defendants *Elizabeth Berney* and *Thomas Trench Berney*.

If there has been delay in the assertion of title, it is the habit of this Court, when called upon to grant an interim injunction, to refuse its interference. From the death of the testator, these parties have never, till the present bill was filed, asserted that the heir at law had a title. The former suit was instituted by the heir at law in the character of incumbrancer only, and therefore affords no answer to the objection of delay. In this view of the subject the Court ought not to grant the injunction even if the case were more doubtful. It was decided by the House of Lords, that during the life of Mrs. *Atkyns* it must remain a matter of uncertainty, whether the expressions contained in this will are recommendatory or mandatory; in the mean time, no person in existence has such an interest, as can be the foundation of an application to this Court for its interference. It has been sug-

(*a*) 1 T. R. 437.

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gested, that the gift to Mrs. *Atkyns* might be considered as a devise in fee to her, coupled with a condition, and that upon breach of the condition, the heir at law would have a right to enter for the condition broken; but the question whether the condition is performed or not cannot arise till after the death of Mrs. *Atkyns*. If this injunction be granted, and every one of the present plaintiffs dies—upon what principle could any collateral branch of the family maintain a supplemental bill? Could they shew such a transmission of interest as to entitle them to the benefit of this suit? This testator has given an estate in fee to Mrs. *Atkyns*, and with it he has given to her all the rights incident to the fee; suppose a person grants to another, upon condition that at his death he should devise to a third,—is there any instance in the books, in which the owner of the fee has been restrained from committing waste? Is there any instance in the doctrine of estrepment, in which a person having a base fee has been deprived of the rights incident to the fee? On the contrary, persons having a limited ownership only have been permitted to commit waste; tenants in tail for instance after possibility of issue extinct. The usual effect of an interim injunction is, that at the termination of the suit, the estate is delivered up to one party or the other with all the benefit which has accrued from the injunction having been awarded, but the effect of this injunction will be, to deprive the defendants of the right in question, to decide at once that they are not entitled to the timber. The bill does not pray that the rights of the parties may be declared, and until the rights of the parties are decided, the injunction, which must be a consequence of the right, cannot be granted.

The *Attorney General* in reply.

If this Court cannot interfere till it is ascertained what parties will eventually become entitled,—in what manner

can the property in the mean time be preserved? In *Hands* v. *Hands* the Court interposed to preserve personal property, in favour of persons having contingent interests;—can there be any difference in this respect between real and personal estate? Had this been the case of an immediate devise, the construction to be put upon the words "my family" could not have been doubted; it is settled by a long train of decisions, that a devise to a man and his family gives a fee to the devisee, because the family means the heir at law. A devise to A. for life, with remainder to the family of B., gives a vested remainder to the heir at law of B., if B. dies in the lifetime of the testator. *Chapman*'s case. (*a*) Lord *Hardwicke* in *Pyot* v. *Pyot*, (*b*) considered it to be so settled. In the present case, either the words "my family" mean the heir at law, or family is synonimous with relations; in either case the objects of the trust are sufficiently certain. It is not denied that the subject is also certain, but it is said that the fee is given to Mrs. *Atkyns*. The Court must look not merely at what is the extent of interest in the party, but what was the beneficial enjoyment intended by the testator. If this testator had devised to Mrs. *Atkyns* and her heirs, upon trust that at her death she would devise to his relations, there can be no doubt that she would have taken an estate for life, with a trust to give to his relations, and with a vested remainder to those relations, in case she made no appointment. Could it have been contended in such a case that she would have been at liberty to cut down timber? In *Stansfield* v. *Habergham* (*c*) the Court restrained an heir at law, who was entitled by way of resulting trust until the determination of an event, upon which future contingent estates were to arise, from cutting timber; at law the heir had the fee, but the Court interposed, because it was the intention

(*a*) Dyer, 333.
(*b*) 1 Ves. Sen. 335.
(*c*) 10 Ves. 273.

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that he should have a limited interest only. Your Lordship has supposed the case of the testator having had estates *ex parte paternâ*, *ex parte maternâ*, copyhold and leasehold estates, and has asked, What would then have been the meaning of the words "my family?" If the testator had devised to Mrs. *Atkyns* for life, with remainder to his heir at law, the same difficulty would have presented itself. The answer to it is, that the testator having blended the real and personal estates together, they must both go to the same person, and that the party entitled to the real estate must take the personal also. In *Doe* dem. *Thwaites* v. *Over*, (*a*) there was a devise of freehold property to the relations on my side, it was said, What is meant by relations as to freehold property? The Court held, that those should take who would be entitled to personal estate under the statute of distributions. The question is not yet ripe for determination who shall be considered to constitute the family of the testator, but we contend, that it means the heir at law only, or at all events does not mean more than relations, and therefore that a trust is raised for objects which are sufficiently certain.

The LORD CHANCELLOR.

Upon reconsidering this case, I am perfectly satisfied that there is no ground to say that Mrs. *Atkyns* is only tenant for life; if there is any obligation upon her to abstain from cutting timber, it must be upon the ground, not that she is tenant for life, but that being tenant in fee, her tenancy in fee is qualified in such a way, that she has not such an interest in the timber, as to be entitled to apply it to her own use.

It has been strongly intimated in the House of Lords,

(*a*) 1 Taunt. 263.

that no decision can be made upon the right to the timber, till after the death of Mrs. *Atkyns*, upon the ground, that if she makes no will, there may be persons who will say they are entitled to the produce of the timber; and that if she does make a will, she may select as objects of her favour, persons, against whom it may be contended, that the words "my family" designating a certain person or persons, they are incapable of taking a beneficial interest. Of course a great many questions of that sort may arise between the different claimants; the question whether, inasmuch as such questions may arise, the right to the timber cannot now be determined, deserves great consideration, for this reason; if Mrs. *Atkyns* be not only tenant in fee, but tenant in fee unfettered by any restriction as to timber, this Court, by restraining her from cutting it, will to all intents and purposes determine against her; for if she dies leaving the timber standing upon the estate, it will be impossible for her personal representatives to obtain the value of it, unless somehow secured in the mean time. The consequence is, that the case presented to the Court is a case, in which as it is said on the one hand, that the Court by deciding the right may prejudice persons who may claim after the death of Mrs. *Atkyns*; it may be said on the other hand, the Court by forbearing to decide, may destroy the whole benefit of that title, which it may hereafter determine to have been in Mrs. *Atkyns*, when that determination will be of no avail either to her or her representatives, unless by some particular order care is taken, that it shall be beneficial to her or her representatives. Supposing that it cannot now be decided, whether the right to the timber is in Mrs. *Atkyns* or not, another question is, whether the Court must not, for the purpose of preserving the property, find some principle upon which it can now in some manner or other interpose?

The questions, what interest Mrs. *Atkyns* takes in the

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Under an immediate devise to A. for life, remainder to "my family," the heir at law of the testator is entitled in remainder.

estates, and what is the beneficial quality of that interest, have been discussed in various ways; first it has been insisted, that the words "my family" import a description of that individual, who was the heir at law of the testator at the time of his death; if this had been a devise to Mrs. *Atkyns* for life, with remainder to "my family," it would have been a bold step to say, that the heir at law of the testator would not have been entitled; whether the cases which have been decided, have been rightly decided or not, there are cases in which it has been held, that a remainder to "my family," operates as a devise to my heir at law. The Court, in its anxiety to find out the meaning of the testator, has found out, that what he has said, has the same meaning as if he had said nothing at all. With respect to those cases, he must be a bold man, who sitting in a judicial chair would attempt to disturb them.

Another way of putting this case has been, that this is a devise in fee to Mrs. *Atkyns*, coupled with a condition; I think it would be difficult to make that out, but supposing it to be a case of condition, I cannot see how parties can come into a Court of Equity to prevent the breach of a condition, who are contending, that the breach of that condition will give them title; that equity I cannot comprehend. The next supposition has been, that the testator has created a power: if it be a power, it must be capable of being exercised amongst different objects, which may be selected out of a class of persons, capable of definition, and of being represented with legal certainty. If the case be neither a trust, a condition, or a power, it has been contended, that it may be a resulting trust for the heir at law; I think it would be extremely difficult to make that out, unless the Court can say it is to be so, if Mrs. *Atkyns* makes no disposition.

With respect to the matter of trust, I confess I cannot

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help thinking, that if there is a title in any of these plaintiffs, it must be founded upon the doctrine of trusts; that this is a fee given to Mrs. *Atkyns*, with an obligation imposed upon her conscience, to dispose of the property, (whatever is meant by the words "the property") at her death, to the family of the testator. In order to determine whether the trust is a trust this Court will interfere with, it is matter of observation, First, that the words must be imperative, that the words are imperative in this case there can be no doubt; Secondly, that the subject must be certain, and that brings me to the question what is meant by the words "the property;" and Thirdly, that the object must be as certain as the subject, and then the question will be, whether the words "my family" have as much of the quality of certainty, as this species of trust requires.

To create a trust by means of an obligation imposed upon the conscience of a devisee, the words must be imperative, the subject must be certain, and the object as certain as the subject.

The words in the fullest confidence are imperative.

Let it be observed that in this case, in the first instance a fee is given in the estate, and one question therefore with respect to the words "the property" is, whether there is any case with respect to a real estate, in which the doctrine of trusts has been carried so far, as to enable the Court to say, that where an estate in fee is given, the trust shall be considered of so restrictive a nature, that the person who is tenant in fee, shall not be at liberty, with respect to timber and mines, to treat the estate in the same husbandlike manner as another tenant in fee. It is a different question, whether the existence of such a trust prevents the exercise of ownership, which an absolute tenant in fee might exercise over the timber, or whether a tenant in fee, subject to such a trust, may make as much havoc and destruction as a tenant for life without impeachment of waste might do. Another question with respect to the words "the property" is, whether those words mean the soil, and not only the soil, but every stick of timber standing upon the estate, *ultra* that which is necessary for the repairs, and for the ordinary

Whether, where an estate in fee is given to the devisee, the trust shall be considered so restrictive, that the tenant in fee shall not be at liberty with respect to timber and mines to treat the estate in the same husbandlike manner as another tenant in fee. Query.

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enjoyment of the estate; that is a point well worth a great deal of consideration, whenever it shall be necessary to decide it.

The next question is what the words "my family" mean; I doubt whether I should ever have given the construction to those words, which has been given to them, but I think every Court is now bound by that construction. The question however in this case is, whether those words, which standing unaffected by any thing contained in the context mean the heir at law, may not be qualified by the context: and if so, whether they ought not to be so interpreted. The cases, I apprehend, go the length of shewing, that the context will affect the construction of words in a will; and if so, another view of the subject arises, whether it is the context only which can affect the construction, or whether on the other hand, the purposes of the testator, and the nature of the enjoyment given to the individual in other parts of the will, may not also affect the construction. Now in this case the testator gives his estate in fee to his mother, and he expressly gives her a power of disposing by will; it strikes one as a very odd thing to say, that the meaning of the testator is, not that she shall give to a person, whom she is to select out of all the objects which the word *family* will comprehend, but that she is to make a will for the purpose of giving to his heir at law, or to say, that though the testator has given her a power to dispose of the property by her will, he has given it in such a way, that the person who is to take must take by his will. I cannot therefore help thinking, that the words "my family" must have such a construction put upon them, that somebody or other, by force of that construction, joined to the effect of her will, may take by the effect of her will; if so, do the words "my family" import a class of persons among whom she is to make a selection, capable of such precise

The context will affect the construction of words in a will; whether the purposes of the testator, and the nature of the enjoyment given to the individual in other parts of the will, may not also affect the construction. Query.

definition, that it can be said, that the objects of this trust are certain. In the course of the argument I suggested the case of a testator creating a power of this kind, having estates coming from different ancestors, estates for instance *ex parte paternâ*, *ex parte maternâ*, copyhold and customary estates descending to different heirs, gavelkind lands, and leasehold estates, and I asked, who was to be considered as the heir to take those estates under the words "my family," whether the heir at law *ex parte paternâ* was to take all the estates, or the different kinds of heirs were to take the different estates according to the descendible property belonging to them. The *Attorney General* observed, that if a testator having such estates was to devise to his heir at law, the same difficulties would arise; Be it so, then the Court must construe the will as well as it could, and must say, that the heir takes by descent; and then there would be no difficulty in finding out, if it could be found out with certainty from the will, what heir was to take. If that difficulty can be so answered, still in a case, where a trust is to be raised characterized by certainty, the very difficulty of doing it is an argument, which goes to a certain extent, I do not say the whole extent, towards inducing the Court to say, it is not sufficiently clear what the testator intended.

It is contended that the words "my family" must be taken in a popular sense, and that the nature of the disposition shews they are not to be taken in a technical sense; —Then what is the popular sense of those words? It is remarkable, that in the will of the person who was the heir at law of the testator at the time of his decease, under which the present plaintiffs are suing, there is a bequest to a wife;—surely it is a singular thing to state that a wife is no part of one's family, and yet the whole argument clearly shuts out the wife, and not only is the

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wife excluded, but according to the argument neither father or mother are any part of a man's family. Suppose that this testator had devised to his wife for life, and had imposed upon her the obligation at her death to give to his family, in the same way in which that obligation is imposed or attempted to be imposed by this will, and suppose that the testator died leaving two brothers, and that the wife by her will passed over the eldest brother, and made the next brother tenant for life, with remainder to his first and other sons, charging portions for the children of the eldest brother, and limiting the ultimate remainder to him; I think no one out of this Court would say, that that was not giving to the family of the testator.

These are the points which appear to me to surround this case;—I am aware that there is considerable difficulty in determining, whether any thing can be done till after the death of Mrs. *Atkyns:* but after having very much considered this part of the case, I cannot help thinking, that some step must be taken by the Court even in this stage of the business. I agree that the Court ought not to decide at this moment upon the rights of any person, who by anticipation it may suppose may at a future day bring forward questions of right before it, unless the rules of the Court, (it being ascertained who the parties are that will be entitled) will enable it to do so: but in this case it must be remembered, that if the Court does not interpose at all, it is negatively deciding the question against one of the parties; for if the Court abstains from doing any thing, and this lady chooses to act upon the supposition that she has no right to cut the timber, the consequence will be, that if it shall hereafter turn out, upon the question arising amongst other persons, that she had the right to cut the timber, she will have lost the whole value of the timber which she might have cut; and on the other hand, if in consequence of

the refusal of the Court to interpose, this lady thinks proper to cut the timber, the consequence will be, that if she dies with assets insufficient to answer the value of the timber she has cut, and it shall hereafter be determined, that she had no right to cut any timber at all, she will have got the timber against those who are entitled to it; so that if the Court does not interpose to a certain extent, the consequence, as it appears to me, necessarily must be this, that though the Court appears to refuse to act, against one or the other it does in effect interpose. The result therefore is, that though the Court cannot at the present time absolutely decide upon the interests of the parties, it must interpose to the extent of taking care, that whenever the interposition of the Court is called for, and can be given, the property shall be in such a state, that the rights of those who may be taken to be, or to have been entitled, may not have been prejudiced.

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The cases which have been decided with respect to personal estate seem to afford the principle, that the Court may interpose to a certain extent. In *Harding* v. *Glyn* (*a*) the testator gave his personal estate to his wife, and he then proceeded in words, which were held to create a trust in favour of his relations; after the death of the testator's wife (how the property had been preserved in the mean time does not appear) a bill was filed by her representative to carry her will into execution; in that case, as in others, the Court said, that the word "relations" meant persons who would be entitled according to the statute of distributions, but it also said, that the word "relations" in that case did not necessarily mean next of kin, but meant every person who might be a relation. Now the word "relations" is undoubtedly a term that sufficiently describes a class of persons, whether the word "family" does or does not; and part of the per-

The word "relations" means persons entitled according to the statute of distributions, and is a term that sufficiently describes a class of persons.

(*a*) 1 Atk. 469.

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sonal estate having been given by the testator's wife to a person who was a relation of the testator, but who was not one of his next of kin, either at his death, or at the death of his wife, it was held, that that part was well given, and that the remainder was distributable amongst those persons who were the next of kin of the testator, not at his death, but at the death of his wife; during the life therefore of the testator's wife, it must have been an utter uncertainty, who would ultimately become entitled; the Court therefore must have said, either that the testator's wife, who might be wrongfully acting upon the property every moment of her life, should nevertheless be entrusted with it during the whole of her life, or that it would somehow or other interpose in order to preserve the property for those, who might take it at her death, with reference to whom not one might be in being till the last hour of her life.

The case of *Pierson* v. *Garnet* (*a*) seems to be a little misunderstood, when taken to establish the doctrine, that this Court will not interpose in such a case as this; I was counsel for Mr *Pierson* in that case, and one great thing we struggled for was, to know to whom he might give the property; indeed my mind was at that time strongly impressed with the notion, that the difficulty of enabling him to know to whom he might give the property was an objection to the doctrine of trusts being applied at all: but the decision was right enough, for nobody can deny, that the word "descendants" is capable of such a construction, as to shew who fell within the class which that word describes;—if I am speaking of my descendants who now are, or of my descendants at the time of my death, no person can doubt who they now are, or who they will be at the time of my death, because they must be persons descended from me. Who is my family is

The word "descendants" is capable of such a construction, as to shew who fall within the class which that word describes.

(*a*) 2 B. C. C. 38, 226.

another matter. The words "my relations" or "my descendants" are capable of construction: but the words "my family," in a popular sense, go round in such a manner that we can set no limit to them. In that case of *Pierson* v. *Garnet* it was not necessary for the Court to interpose at all, because the property was in the hands of trustees. The bill was brought by Mr. *Pierson* against the trustees to compel them to hand over the property to him; the Court held, that Mr. *Pierson* had no right to call for the property out of the hands of the trustees, and that was all which it was necessary for the Court to do, because the right of Mr. *Pierson* being negatived, the trustees would preserve the property for those who were to take it.

In the case of *Hands* v. *Hands* (*a*) the Court did interpose to secure the property, and if the Court will not interpose, upon the ground that the right may be controverted on the death of the person in whom such trusts are vested, the consequence appears to me to be, that it is impossible sufficiently to provide for the rights of all parties, who may be interested on the death of such persons.

My opinion therefore is, that the defendants should be at liberty to cut the timber, in a husbandlike manner, giving security for the value, or bringing the value into Court; and I cannot help thinking, that it is a question upon which I should hesitate a long time, before I should go the length of saying, that the person who has the fee given in this sort of way, is not entitled to cut down timber in a husbandlike manner, as a tenant in fee in the ordinary management of the property might do. That is the strong inclination of my mind: but at the same time in a case of this kind I will not go farther than to say, that where a decision, which is to bind others, can only

(*a*) 1 T. R. 437.

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be made hereafter, it is the duty of the Court in the meantime to keep the property in such a state, that when it is made out who are the objects of favourable decision, they may have the benefit of it.

The following are the Minutes of the Order made by the *Lord Chancellor* :—

Let the defendants *Charlotte Atkyns*, *Elizabeth Berney* and *Thomas Trench Berney* be at liberty to cut down the timber standing and growing upon the premises in question in this cause, in a husbandlike manner, as tenant in fee, giving the plaintiffs an account of what is felled. And let the said defendants *Charlotte Atkyns*, *Elizabeth Berney* and *Thomas Trench Berney* pay the money to arise by sale of the said timber, (the amount to be verified by affidavit) into the Bank, with the privity of the Accountant General of this Court, to be there placed to the credit of this cause; and let the said defendants *Charlotte Atkyns*, *Elizabeth Berney* and *Thomas Trench Berney* be at liberty to apply to this Court for more enlarged powers of cutting the said timber; and let any agent to be appointed by the plaintiffs have liberty from time to time to attend, and see that the cutting of the timber is proper according to the meaning of this order. And let the plaintiffs be at liberty to apply to this Court as they may be advised. And let the said defendants *Charlotte Atkyns*, *Elizabeth Berney* and *Thomas Trench Berney* be at liberty to apply to this Court to have the said money paid out to them, upon giving security for the same; and let the said defendants *Charlotte Atkyns*, *Elizabeth Berney* and *Thomas Trench Berney* be at liberty to appeal from this order to the House of Lords, notwithstanding they act under the same. And this Court does not think fit to make any other order as to the injunction prayed in this cause.

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GEORGE HARRIS *v.* HENRY HARRIS.

HENRY HARRIS *v.* GEORGE HARRIS.

Feb. 27.
March 1, 4, 6.
May 3.

GEORGE HARRIS filed his original bill against *Henry Harris* on the 4th of *April* 1822, but in consequence of a difficulty in finding the defendant the *subpœna* was not served until the 23d of *September*, and was not returnable until the 6th of *November* following; *Henry Harris* filed a cross bill against *George Harris* on the ensuing 8th of *November*. *George Harris* took out two orders for time to answer the cross bill, and *Henry Harris* also took out orders for time to answer the original bill; but the original cause being a country cause, and the cross cause a town cause, *Henry Harris* would have been in a situation to compel an answer to the cross bill, before *George Harris* could have enforced an answer to the original bill. A motion was therefore made on the part of *George Harris*, that the proceedings in the cross cause might be stayed, till *Henry Harris*, the plaintiff in that cause, should have fully answered the original bill. The motion had been made before the *Vice-Chancellor*, and refused.

If a bill and cross bill be filed, the plaintiff in the original bill has a right to the first answer, and may move to stay proceedings in the cross cause till the original bill is answered, though the plaintiff in the cross bill may be in a situation to enforce an answer first.

The right of the plaintiff in the original bill to make the motion, was held not to have been waved, by his having taken out the common orders for time to answer the cross bill.

Mr. *Heald* and Mr. *Glyn* in support of the motion contended, that although the plaintiff in the cross suit might be in a situation to call for an answer first, the plaintiff in the original suit had a right to the first answer as the reward of his superior diligence in the institution of the suit; and that he did not wave his priority by taking out orders for time to answer the cross bill.

Mr. *Shadwell* against the motion.

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The LORD CHANCELLOR.

Cases may happen, in which the plaintiff in the original suit may suppose that he can put in his answer in the cross suit, before the expiration of the orders for time, without suffering any prejudice from not insisting upon the original bill being first answered. It is difficult to say that taking out orders for time amounts to an absolute waver of the right to the first answer. It does not occur to me that the point has ever arisen, and I should wish therefore to be furnished with the opinion of the Registrars,—Whether where the original cause is a country cause, and the cross cause a town cause, the same right of priority obtains as where both causes are of the same description? and whether the plaintiff in the original suit waves his priority by taking out orders for time to answer in the cross suit.

March 4. The LORD CHANCELLOR mentioned this motion, and said that according to the practice of the Court *George Harris* had the right to call upon *Henry Harris* to put in his answer first, and that the question was whether he had waved that right?

The LORD CHANCELLOR.

March 6. In this case it was originally represented to me, that the *Vice-Chancellor* upon the certificate of the Registrars had decided, that the plaintiff in the original suit, by moving in the cross suit for a month's time to answer, waved the right to move, that he should have a month's time to answer the cross bill after the answer was put in to the original bill. It turns out that that was a mistaken representation, and that the communication to the *Vice-Chancellor* was made by some of the Six Clerks;—the Registrars are divided in opinion upon the point, and so far are the Six Clerks from being agreed upon it, that

they will not issue process under such circumstances. It does not appear to me at all inconsistent with the present motion, that the plaintiff in the original suit has asked for the usual orders for time to answer in the cross suit; he may have given the defendant credit for diligence; it is clear he might have made this application before he took out the common orders for time,—is he then to be excluded from it because he has been more reasonable in the first instance? No decision is to be found upon the point.

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The LORD CHANCELLOR said, he did not think that any step taken in the cross suit prevented the right to call for an answer in the original suit, and granted the motion.

May 3.

BURGES *v.* MAWBEY.

ROLLS, *May* 5.

SIR *Joseph Mawbey* being seized of certain freehold and copyhold estates, subject to various charges thereon, and to the payment of several annuities, by his will, dated the 11th of *October* 1792, gave and devised the same, to the use of *Thomas Wood* and *Maurice Swabey* their executors administrators and assigns for the term of 500 years, upon trust to raise money for the payment of certain portions to his children, and also if necessary for the payment of his debts and legacies, and after the determination of the said term of 500 years, the

An infant tenant in tail is bound to keep down the interest of debts charged upon the entailed estates.

A tenant for life was also held to have been liable to keep down the interest of the debts, although, having the ultimate remainder in fee, he had consented to an act of parliament, by which the estates were vested in trustees for the payment of the debts.

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said testator devised the premises, to the use of his son *Joseph Mawbey* for life, remainder to trustees and their heirs during his life to preserve contingent remainders, remainder to the use of the first and other sons of the said *Joseph Mawbey* the son successively in tail male, remainder to the use of any other son or sons of the said testator by any future wife successively in tail male, remainder to the use of the first and other daughters of the said *Joseph Mawbey* the son according to seniority in tail male, remainder (after divers interposed estates tail to other persons) to the use of the heirs of the said testator's own body, with divers remainders to other persons in tail, with the ultimate remainder to the said testator's own right heirs for ever.

The testator by a codicil to his will appointed his son, the said *Joseph Mawbey*, his sole executor, and on the 16th of *June* 1798 he died, leaving the said *Joseph Mawbey* the son, who then became Sir *Joseph Mawbey*, his heir at law.

Upon the death of the testator Sir *Joseph Mawbey* the son 'proved his will, and entered into possession of the devised estates, and shortly afterwards some of the creditors of the testator filed a bill to carry into execution the trusts of his will, and to have the usual accounts taken of his personal estate, and of the rents and profits of the estates comprised in the term of 500 years, and in the event of the personal estate proving insufficient for the payment of the testator's debts, then to have the deficiency raised by mortgage or sale of the premises comprised in the aforesaid term.

By the decree made upon the hearing of the cause, on the 2nd of *May* 1798, the will of the testator was established, the accounts prayed by the bill were directed, and it was ordered that, in case the personal estate of the

testator should not be sufficient for the payment of his debts, the Master should enquire whether the deficiency could be raised by sale or mortgage of the premises comprised in the said term of 500 years.

On the 13th of *June* 1804 the Master made his report, and thereby certified, that there would be a deficiency of the testator's personal estate for the payment of his debts, to the amount of 45,000*l.* or thereabouts; and that he was of opinion, that such deficiency could not be raised by sale or mortgage of the premises comprised in the term, and he submitted to the Court, that such deficiency could not be raised without the interposition of the Legislature, authorising a sale of the fee simple of such parts of the testator's estates, as would be sufficient for raising such deficiency.

The cause was heard on further directions on the 4th of *December* 1804, and was then ordered to stand over until an application should be made for an act of parliament, for authorising a sale of the fee simple of the testator's estates comprised in the term of 500 years, or so much thereof as should be necessary for raising so much money, as the testator's personal estate should be deficient for the payment of his debts and legacies. An act of parliament was accordingly obtained in the year 1805, by which the estates comprised in the said term were vested in the said *Thomas Wood* and *Maurice Swabey* and their heirs, upon trust to sell; and it was enacted, that the purchase monies should be paid into the Bank, to be applied under the direction of the Court of Chancery, in satisfaction of the claims and demands upon the estate of the testator.

Previous to the month of *August* 1808, a large portion of the debts due from the testator were paid off, partly

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by Sir *Joseph Mawbey* the son out of his own monies, and partly by means of a sale made under the aforesaid act of parliament; and on the 10th of *August* 1808, an order was made in the cause, upon the petition of the plaintiffs, whereby, amongst other things, it was ordered, that the Master should inquire and state to the Court, what was due to Sir *Joseph Mawbey* the son, in respect of interest paid by him on any of the said testator's debts, or on account of the debts of the testator paid by him or otherwise; and it was further ordered, that the said Sir *Joseph Mawbey* the son should be admitted a creditor on the testator's estate for so much as should appear due to him as aforesaid, and that so much of the estates comprised in the said act of parliament, as should be necessary for the purpose of paying what should be found due to him the said Sir *Joseph Mawbey* the son, should be sold pursuant to the said act.

Before any proceedings under this order were completed, and on the 27th of *August* 1817, Sir *Joseph Mawbey* the son died, without ever having had any male issue, leaving two daughters only, *Emily Mawbey* and *Anna Maria Mawbey*, and having by a codicil to his will appointed his wife Lady *Mawbey* to be his sole executrix. Upon the death of Sir *Joseph Mawbey* the son, *Emily*, his eldest daughter, (who was then an infant) became tenant in tail of the devised estates; she died on the 25th of *March* 1819, without having been married, and before she attained the age of twenty-one years. Upon her death, her sister *Anna Maria Mawbey* became tenant in tail of the said estates; she intermarried with *John Ivatt Brisco* on the 25th of *September* 1819, and attained her age of twenty-one years on the 25th of *March* 1822.

Subsequently to the order of the 10th of *August* 1808, other sales were made under the aforesaid act of parlia-

ment; and parts of the purchase monies arising therefrom were received by the said Sir *Joseph Mawbey* the son, in his lifetime, and by the said Lady *Mawbey* after his decease.

The original cause was revived after the death of Sir *Joseph Mawbey* the son, and by a decretal order, dated the 12th of *March* 1821, it was amongst other things ordered, that the Master should enquire and state to the Court, what was due to Lady *Mawbey*, the executrix of the said Sir *Joseph Mawbey* the son, in respect of interest paid by her, or the said Sir *Joseph Mawbey* the son, on any of the debts of the said Sir *Joseph Mawbey* the elder, or in discharge of the principal of such debts; and it was ordered, that the said Lady *Mawbey* should be at liberty to retain the purchase monies received by her, and by the said Sir *Joseph Mawbey* the son as aforesaid, in part satisfaction of what the Master should find due to her from the estate of the said Sir *Joseph Mawbey* the father, and that she should be admitted a creditor on the estate of the said Sir *Joseph Mawbey* the father, for so much as the said Master should find to be due to her; and it was further ordered, that so much of the estates comprised in the said act of parliament, as would be sufficient to raise what should be found due to Lady *Mawbey*, should be sold, pursuant to the said act.

The Master made his report, in pursuance of the said decretal order, on the 1st of *June* 1821; and the report was absolutely confirmed by an order dated the 3d of the same month of *June*.

The cause now came on upon a petition of re-hearing, presented by the said *John Ivatt Brisco* and *Anna Maria* his wife; the petition stated, that the petitioners were advised, that the said Sir *Joseph Mawbey* the son, as tenant for life of the said estates, was bound during his

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life, and that the said *Emily Mawbey* his eldest daughter, as tenant in tail of the said estates, was bound during her life, to pay and keep down the interest of the debts of the said Sir *Joseph Mawbey* the father, which by his will were charged upon the said estates and premises; and that therefore so much of the said order of the 10th of *August* 1808, as directed that the Master should enquire and state to the Court what was due to Sir *Joseph Mawbey* the son, in respect of interest paid by him on any of the said testator's debts was erroneous, and that so much of the said decretal order of the 12th of *March* 1821, as directed that the said Master should enquire and state to the Court what was due to Lady *Mawbey* in respect of interest paid by her, or by the said Sir *Joseph Mawbey* the son, on any of the debts of the said Sir *Joseph Mawbey* the father, was in like manner erroneous.

The petition then proceeded to state, that it appeared by the Master's report of the 1st of *June* 1821, that Lady *Mawbey* had been admitted a creditor for 6850*l.* in respect of interest upon the debts of the said Sir *Joseph Mawbey* the father, paid by the said Sir *Joseph Mawbey* the son, or by her the said Lady *Mawbey* after his decease, and insisted, that the said sum of 6850*l.* ought to have been paid out of the rents and profits of the said estates, received by or on the behalf of the said Sir *Joseph Mawbey* the son, during his life, and of the said *Emily Mawbey* after his death, and ought not to be charged upon, or to be raised by sale of the said estates.

The petition therefore prayed, that the order of the 3d of *June* 1821, confirming the Master's said report might be discharged; and that the cause might be reheard, as to so much of the decrees of the 10th of *August* 1808, and the 12th of *March* 1821, as was thereinbefore complained of, and as to the allowance to Lady *Mawbey* of interest paid or accrued upon the debts of Sir *Joseph*

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Mawbey the father, at any time before the death of the said *Emily Mawbey*; and that the Master might be directed to review his report of the 1st of *June* 1821 as to such allowance of interest. (*a*)

Mr. *Sugden* and Mr. *Bickersteth* for the petitioners.

Mr. *Agar* and Mr. *Moore* for Lady *Mawbey*.

The *Master of the Rolls*, after recapitulating the facts of the case, and observing, that the will of Sir *Joseph Mawbey* the father was imperfectly set out in the pleadings, and that it contained a recital of a settlement, by which it appeared, that Sir *Joseph Mawbey* the son had considerable other property, besides the estates which formed the subject of the suit, proceeded in the following manner.

This cause has been reheard by the consent of the parties, for the sake of obtaining the opinion of the Court, as to the principle upon which the accounts should be taken. The petitioners contend, that Sir *Joseph Mawbey* the son, as tenant for life, and his eldest daughter, as tenant in tail, were respectively bound to keep down the interest of the debts. The questions therefore affect, first, the tenant for life, secondly, the tenant in tail.

First, With respect to Sir *Joseph Mawbey* the son, tenant for life; it is not contended, that if he had paid the principal of the debts, he would not have been a creditor on the estate *pro tanto*; but it is said, that in paying the interest, he only did what he was bound to do, and therefore had no claim to charge the estate for the in-

(*a*) There was no representative of *Emily Mawbey* before the Court, but upon Lady *Mawbey*'s undertaking to take out administration to her the cause was permitted to proceed.

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terest which he so paid. One thing is quite clear, that as between the tenant for life and the creditors there could be no question; the creditors might take the whole of the rents and profits; whatever right the tenant for life has to any part of them, arises from the equity subsisting between him and the remainder-man. The principle is clear, the tenant for life is bound to keep down the interest of the debts, beyond that, as between him and the remainder-man, he is bound to do nothing; and after paying the creditors the interest of their debts, he may put the surplus of the rents and profits into his own pocket. It would be quite idle, at this time of day, to cite authorities in support of that principle; it is taken for granted in all the cases, from Lord *Hardwicke* down to the present time. *Revel* v. *Watkinson*, (*a*) *Tracy* v. *Hereford*, (*b*) Lord *Penrhyn* v. *Hughes*, (*c*) *Bertie* v. Lord *Abingdon*. (*d*) Generally speaking therefore, it is perfectly clear, that the tenant for life is bound to keep down the interest; it has been attempted however to distinguish this case by two circumstances; First it is said, that Sir *J. Mawbey* the son was not bare tenant for life, but having the ultimate remainder in fee, and consenting to the act of Parliament, he was entitled to favour. The answer to that argument is, that his ultimate remainder in fee was worth nothing; the estate was given to so many intermediate persons in tail, that the ultimate remainder could add no value to his life estate. The second ground upon which it has been argued that Sir *Joseph Mawbey* the son was entitled to favour is, that being the eldest son, he was entitled to maintenance as against the remainder-man; it is perfectly clear, that the heir at law, not otherwise provided for, is, as against the remainder-man, entitled to a provision; but it is not stated in any part of the pleadings, that Sir *Joseph Mawbey* the son was unprovided for, nor is there the least shadow of a

Tenant for life is bound to keep down the interest of debts, but being an heir at law not otherwise provided for, is, as against the remainder-man, entitled to maintenance.

(*a*) 1 Ves. 93.
(*b*) 2 Bro. 129.
(*c*) 5 Ves. 99.
(*d*) 3 Meriv. 560.

ground even for an inquiry as to that point. These two grounds then failing, this is no more than the ordinary case of tenant for life, bound to keep down the interest, and the decree complained of is so far erroneous.

The second question respects a smaller sum, but is a question of more difficulty; *Emily Mawbey*, the eldest daughter of Sir *Joseph Mawbey*, succeeded to him, and enjoyed the estates for two years, during all which time she was an infant. The question is, whether she was bound to keep down the interest of the debts. It is of great importance to settle the point, as it is one which may frequently arise; there is an opposition of great authorities on the subject; of Lord *Talbot* in 1734, and Lord *Hardwicke* in 1742, but after carefully looking at the case, I have satisfied my own mind that there can be no doubt.

First as to the principle. The ground why an adult tenant in tail is not bound to keep down the interest of debts is, because he is in fact the owner of the estate, and the remainder-man is at his mercy. Against an adult tenant in tail therefore, the remainder man has no equity. The question is only as to an infant tenant in tail. Now as to the power of an infant tenant in tail to suffer a recovery, it has been said, that he may obtain a privy seal to enable him to do so; as a matter of curiosity I have looked into this subject; it is a singular mode of application to the King, for a recommendation to the Judges of the Court of Common Pleas, to permit the infant to suffer a recovery; yet it is laid down, that it is at the discretion of the Judges whether they will permit it; and it is a question whether such a recovery is not reversible in error. In 2 *Salk.* 567. Sir *J. St. Albans'* case, several precedents were cited; but the Judges disallowed the privy seal. (*a*)

(*a*) See 1 Ld. Raym. 113. Ld. *Newport v.* Sir *Henry Mildmay*, Cro. Car. 307.

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That is the latest authority on the subject, and in Mr. *Cruise*'s Digest (*a*) it is stated, that the practice of privy seals is now disused, and that private acts of parliament are universally substituted in their stead. (*b*) If therefore the principle is, that an adult tenant in tail is favoured, because he can make the estate his own, an infant tenant in tail cannot be put upon the same footing, because he cannot make the estate his own.

Next with respect to authorities; they are directly to the contrary; the first indeed is *primâ facie* in favour of the infant: it is that of *Chaplin* v. *Chaplin* (*c*) by Lord *Talbot*. The expressions of Lord *Talbot* are general, nor does he advert to the distinction between adults and infants tenants in tail, but it was the case of an infant. Opposed however to that case is another by Lord *Hardwicke*, which is exactly in point; *Sergison* v. *Sealey* (*d*) has always been considered a leading case on the subject, and as forming the rule upon which the Court is to proceed; there are a diversity of reports of that case; the report in *Atkyns* is deficient in dates and circumstances, which have been supplied in a great measure by Mr. *Sanders* from the Registrar's books. I thought however that it would be a satisfaction to the bar to ascertain the correctness of that case from the notes of Lord *Hardwicke*. I therefore applied to the present Lord *Hardwicke*, and although I have not been able to obtain any note by Lord *Hardwicke* himself, I have been favoured by his family with two MSS. reports of the case. I have compared these reports with Mr. *Sanders*' extracts from the Registrar's book, and find that they correspond nearly as to dates, and exactly as to family. In one thing all the reports concur, namely, that Lord *Hardwicke* did

(*a*) Vol. V. 432.

(*b*) That the practice of privy seals, although disused, is still to be considered as part of the law of the land. See *Doe* v. *Rawding*, 2 B. and A. 441.

(*c*) 3 P. Wms. 229.

(*d*) 2 Atk. 416.

apply the rents and profits to keep down the interest. This case, and that of *Chaplin* v. *Chaplin*, are mentioned in several cases. In *Amesbury* v. *Brown*, (*a*) though on a different question, Lord *Hardwicke* adverts to both these cases; after mentioning the case of *Sergison* v. *Cruise*, which is the same case as *Sergison* v. *Sealey*, he adds, "*Chaplin* v. *Chaplin* is said to be determined differently; but I do not know whether they agree in circumstances, which may make a difference." So that he does not seem to think that his own decision was at all broken in upon. In *Jones* v. *Morgan* (*b*) the general doctrine as laid down by Lord *Hardwicke* is recognized by Lord *Thurlow*, and in *Ware* v. *Polhill* (*c*) Lord *Eldon* states the rule in the same way. In *Bertie* v. Lord *Abingdon* (*d*) it is well known that the question arose between the real and personal representatives between whom there could be no equity, but the *Master of the Rolls* says, "there could be no question as to the obligation of an infant tenant in tail to keep down the interest as against the remainder-man."

Under this review of the subject, the case of *Sergison* v. *Sealey* has not been shaken, and therefore must govern this. Lord *Hardwicke* in adverting to the case of *Chaplin* v. *Chaplin* said there might be a difference of circumstances; I think there is, though a very slight one. The infant tenant in tail, having suffered the interest to fall into arrear, died just before he came of age, leaving a personal estate, and Lord *Talbot* was asked to order the executors to pay the arrears out of the personal estate. Lord *Talbot* refused to do it. And in *Sergison* v. *Sealey* Lord *Hardwicke* said, that the interest should not be paid out of the personal estate, but that the rents and profits were the fund out of which the guardian should have paid the interest. If that does not reconcile these two cases, I think the point is decided by *Sergison* v.

(*a*) 1 Ves. 479.
(*b*) 1 Bro. 206.
(*c*) 11 Ves. 257.
(*d*) 3 Meriv. 560.

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Sealey. The petitioners have therefore made out both their grounds. The direction as to the tenant for life and his infant daughter were both irregular; and the mother and guardian of the daughter ought to have applied the rents and profits, in keeping down the interest of the debts.

May 6. STEVENS *v.* GUPPY.

Where the enrolment of a decree is gained by surprize, the Court will vacate it.

MR. *LOVAT* on the part of the plaintiff moved, to vacate the enrolment of the decree pronounced at the Rolls in this cause, under the following circumstances, which appeared upon admissions made by the solicitors of both parties.

On the 30th of *March* 1822 the decree was pronounced, and on the 6th of *December* in the same year the plaintiff presented a petition of rehearing; the order for rehearing was dated on the following day, and was entered with the Registrar and served upon the 12th of *December*. The decree was enrolled upon the 10th of *December*. Previous to the month of *December* several conversations had taken place between the solicitors of the plaintiff and defendant, in which intimation had been given of the plaintiff's intention to appeal from the decree, and in a conversation which passed a few days before the petition of rehearing was presented, the solicitor for the plaintiff had informed the solicitor for the defendant, that the petition was prepared, to which the latter had answered by desiring that no time might be lost in presenting it.

The motion was made for the purpose of letting in the plaintiff to appeal from the decree, which was pronounced upon the merits.

Mr. *Lovat* in support of the motion argued, that where the enrolment of a decree was a surprize upon the opposite party, the Court would vacate it, and cited *Kemp* v. *Squire*, (*a*) Anon. 1 Vern. 131.

Mr. *Romilly* against the motion insisted, that the enrolment of a decree could only be prevented by a *caveat* being entered, and that even if a case of surprize was made out, the Court would not vacate the enrolment where the decree was made upon the merits. *Charman* v. *Charman*. (*b*)

The LORD CHANCELLOR.

It is not attempted to be intimated that there is any intention of delay on the part of the plaintiff; I have no difficulty in saying that it is a surprize, if the party enrolling the decree has said that, which might lead the other party to believe, that the decree would not be enrolled.

The order was made for vacating the enrolment.

(*a*) 1 Ves. Sen. 205. (*b*) 16 Ves. 115.

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Feme sole makes a mortgage, and afterwards marries; the mortgage is then transferred, and the husband joins in the transfer, and covenants to pay the money. During the coverture, the husband by gradual payments out of his own property reduces the money due upon the mortgage; by his will he makes a disposition of the mortgaged premises, and dies in the lifetime of his wife; upon a bill by the wife, who claimed to be entitled by survivorship, to redeem the mortgage; the redemption was decreed upon the terms, that the husband's estate should stand in the place of the mortgagee, for the sums paid by him out of his own property in reduction of the mortgage debt.

IN the month of *June* 1784 the plaintiff, who was then unmarried, assigned a leasehold house, to which she was entitled for the residue of a term of 98 years, to *Henry Maddock* by way of mortgage for securing the sum of 220*l.* and interest; in 1797 the plaintiff intermarried with *John Pitt*, and in *November* 1809, by an indenture of that date, made between *Elizabeth Robinson* (in whom the mortgage was then vested) of the first part, *John Pitt* and the plaintiff his wife of the second part, and *Sarah Fullwell* of the third part, the mortgaged premises were assigned to *Sarah Fullwell*, for the then residue of the said term of 98 years, subject to redemption on payment by *John Pitt* and the plaintiff his wife their executors administrators and assigns, to *Sarah Fullwell* her executors administrators or assigns, of the said sum of 220*l.* and interest; it did not appear by the pleadings, but it was admitted at the bar, that this indenture contained a covenant by *John Pitt* for the repayment of the mortgage money. *John Pitt* died in *October* 1820, and by his will, dated on the 19th of that month, appointed the plaintiff and *John Pitt* one of the defendants to be his executors, and disposed of the mortgaged premises, and of the general residue of his personal estate in the following terms: "I give my leasehold house wherein I reside, and all my effects and personal estate whatsoever, unto my wife during the term of her natural life, subject as to my said house to such sum of money as shall be due on the security thereof, and to the rents and covenants contained in the original lease thereof; and after her decease, I give my said leasehold house and personal estate to all my children, equally to be divided between them." During the coverture several payments were made by the

husband out of his own property which effected a considerable reduction in the money due upon the mortgage.

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The plaintiff, stating these facts, and alleging by the bill that 17 guineas only remained due upon the mortgage, insisted, that upon the death of her husband the leasehold premises in question survived to her as her absolute property, and prayed, that it might be declared that she was alone entitled to the said leasehold premises, or to the equity of redemption thereof, and that she might be let in to redeem the same upon payment of what upon an account to be taken should be found to be due for principal and interest on the mortgage, and that the said leasehold premises might be re-assigned, and the deeds relating thereto delivered up to her accordingly.

The defendants *John Pitt* and *Lucy Pitt Sarah Pitt* and *Diana Pitt*, the children of the testator *John Pitt*, by their answer submitted, that the testator having out of his own proper monies paid off the whole of the mortgage money, excepting the sum of 17*l.* 17*s.*, the plaintiff did not become entitled by survivorship to the said leasehold premises, or the equity of redemption thereof, as her own absolute property, but only to an estate for life therein under the will of the said testator, and that the acts done by the testator amounted to a reduction into possession of the mortgaged premises; but in case the Court should be of opinion that the plaintiff was entitled to the mortgaged premises by way of survivorship, they submitted, that as the children of the testator they were entitled to stand in the place of the mortgagees of the premises for such part of the mortgage money as the testator should be found to have paid off.

The mortgagees stated in their answer that they were willing to be redeemed, but that they had received a notice from the children of the testator alleging, that he had

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reduced the mortgage into possession, and was the absolute owner of it, and that they had the right to redeem.

In *June* 1822 a decree was pronounced, by which it was declared that the plaintiff was entitled to redeem, and an account was directed. The cause now came on to be reheard by the consent of the parties.

Mr. *Roupell* for the plaintiff.

As the husband had the absolute interest in the equity of redemption, subject only to the wife's claim by survivorship, he must be considered to have paid off the incumbrance for the benefit of the estate; the case is analogous to that of a tenant in tail paying off an incumbrance, which is an equivocal act, and the law presumes that he does so for the benefit of the estate, till the contrary is shewn by some declaration of his intention to keep the charge subsisting.

Mr. *Norton*, for the defendants the children of the testator, cited *Kirkham* v. *Smith*, (*a*) *Bagot* v. *Oughton*, (*b*) and *Lewis* v. *Nougle*. (*c*)

The MASTER *of the* ROLLS.

The defendants have not persevered in resisting the right of the plaintiff to redeem, or in insisting, as they did by the pleadings, that acts were done by the husband in his lifetime sufficient to reduce this chattel into possession: but they have contended, that admitting no act was done by the husband sufficient to reduce this chattel into possession, there is still an equity on the part of his estate to be reimbursed the payments made in his lifetime

(*a*) 1 Vez. 258.
(*b*) 1 P. Wms. 347.
(*c*) Ambl. 150.

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in reduction of the mortgage debt. The mortgage money was reduced by advances made by the husband out of his own property, and by gradual payments he effected the reduction stated in the pleadings. Then comes the question—for what purpose did he do this? Because in all cases where money is paid off by individuals, not having an absolute permanent interest in the premises, the court looks at the intention; for instance, where a tenant in tail pays off an incumbrance, *prima facie* he is considered as disencumbering the estate, but still the court thinks itself at liberty to look at the intention. In *Kirkham* v. *Smith* the tenant in tail had paid off a charge upon the estate amounting to 5800*l.*; he had taken no assignment of the debt, and there was nothing distinctly to shew any intention on his part to keep alive the charge, and yet, he having considered the estate as his own, the Court took upon itself to say he ought to be reimbursed; that is a strong case to shew what is the criterion of the intention. In this case consider the situation of the husband: he had not the absolute interest in the property, he was not sure that it would become his own, but it may fairly be inferred from his will that he had persuaded himself that it was his own; his will leads one strongly to believe, that there was an impression upon his mind, that he had done sufficient to render this, which was once the chattel of his wife, his own; if he had survived he would have had it absolutely, but he dying in the lifetime of his wife she became entitled; the question is—what under these circumstances is the true equity? It is said that by the marriage the wife's debt was transferred to the husband, and in the next place, that he has by covenant imposed upon himself the obligation to pay; with respect to the last point, the case of *Bagot* v. *Oughton* shews that the covenant to pay is not decisive; that case is not exactly similar to the present, because there the question was,—whether payment of the mortgage money out of the husband's assets could be compelled, here the party is

In all cases where money is paid off by individuals, not having an absolute permanent interest in the premises, the Court looks at the intention.

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filing a bill to redeem, and it is insisted, that coming to redeem she ought to do equity, and consider what her original right was, and that it was by her husband's acts that this mortgage money was reduced. I have not been able to find any direct case in point, but upon the general principle which I have stated, I think there is sufficient to authorise the Court to say, that this family should be permitted to have the benefit of the sum which the husband has paid out of his own estate, and that the redemption ought to be upon the terms, that the family be permitted to stand in the place of the mortgagee, for the amount in which the husband has reduced the debt.

1822.
November 20.
1823.
January 23,
May 6.

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A defendant who has put in three insufficient answers, and is in custody for want of a fourth, is entitled to his discharge immediately on filing the fourth answer.

After a fourth answer reported insufficient, it is a motion of course, that the defendant shall be examined upon interrogatories and stand committed.

THE bill in this cause prayed, that the plaintiff might be let in to redeem certain plantations and estates in the West Indies, of which it was represented that the defendant had been for a long time in possession as mortgagee, and it called for a discovery of the deeds accounts books of account invoices bills of lading plantation-books letters notes memorandums papers and writings, relating to the mortgaged premises, and the crops and produce thereof, and the consignments made therefrom, and required the defendant to set forth, whether he had the same then, and if not then, whether he had the same formerly, and if formerly, when last in his possession custody or power.

The interrogatories are to be settled by the Master, and must go directly to the points to which the exceptions are sustained.

The defendant, instead of putting in a written examination to the interrogatories, is to be examined personally upon them by the Master.

The defendant by his first answer stated, that by indentures of lease and release, dated respectively the 5th and 6th of *April* 1799, he conveyed the plantations and estates in question, to the plaintiff and his then partners in trade, in consideration of 120,000*l*., payable by several instalments, and that by other indentures of lease and release, dated respectively the 9th and 10th of the same month of *April*, the said plaintiff and his partners, reconveyed the same plantations and estates to him the defendant in fee, by way of mortgage for securing the due payment of the said several instalments. The defendant further stated, that the plaintiff and his partners paid the first instalment of the purchase money, but that not finding it convenient to pay the remaining instalments, they entered into an agreement with the defendant, by which it was provided, that he should take back the plantations and estates, repaying to the plaintiff and his partners the money which they had expended thereon, and refunding the instalment of the purchase money which had been paid; and the defendant stated, that in pursuance of the said agreement, the said plantations and estates were, by indentures of lease and release, dated respectively the 23d and 24th of *May* 1800, absolutely reconveyed to him the defendant in fee. After further stating, that the amount of the monies to be paid by him to the plaintiff and his partners, and the adjustment and settlement of the accounts between them, was ultimately referred to the decision of arbitrators, and that he had long since paid the sum awarded to be due from him to the plaintiff and his partners; the defendant insisted, that he ought to be considered as the absolute owner of the said plantations and estates, and that he was not bound, and ought not to be compelled, to set forth or produce any account of the proceeds profits or produce thereof, or any of the deeds papers or writings relating thereto.

Exceptions were taken to this answer, upon the ground

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that the defendant had not fully answered the interrogatories contained in the bill as to the deeds accounts &c.; the exceptions were allowed by the Master, and exceptions taken by the defendant to the Master's report were overruled by the Court.

The defendant then put in a second answer, in which he again submitted to the Court, that he was not bound to give the information required by the bill, and by the exceptions to the first answer; the second answer was referred back to the Master upon the old exceptions, which, after having been allowed by the Master, were submitted to by the defendant.

A third answer was then put in by the defendant, in which he admitted, that he had in his possession custody or power divers plantation-accounts letter-books letters notes memoranda papers and writings, relating to the plantations crops produce and consignments in the bill mentioned, the particulars of which he set forth in a schedule annexed to the answer. The defendant further stated, that he believed, that a great number of books of account accounts invoices bills of lading plantation-books letters notes memoranda papers and writings, relating in the whole or in part to the said plantations crops produce and consignments, were then in the island of Tobago in the West Indies, but he did not state, whether the last mentioned documents were or were not, or had or had not been, in his possession custody or power, and he also omitted to state, when certain other deeds and papers, which were impliedly admitted to have been in his possession custody or power, were last in his possession custody or power.

The third answer having been referred for insufficiency, upon the exceptions taken to the first answer, was reported insufficient; and the defendant was then taken

into custody upon an attachment for want of an answer; he then put in a fourth answer, in which he again omitted to state, when last he had possession of certain title deeds, admitted to have been formerly in his possession; and in another part of the fourth answer he denied, that the West India papers, mentioned in his former answer, which he admitted were belonging to him, were in his possession custody or power, because they were then coming over to this country.

Immediately upon the fourth answer being filed, Mr. *E. R. Daniel* moved, before the *Vice-Chancellor*, that the defendant might be discharged out of custody. The motion was not made upon notice, but it was opposed, on behalf of the plaintiff, by Mr. *Agar*, upon the authority of an order of Court of the 30th of *April* 1700, (*a*) which provides, that from thenceforth no plaintiff shall be put to prosecute a defendant for a fourth answer, but that after a third answer reported insufficient, every defendant shall be examined upon interrogatories to the points reported insufficient, and shall stand committed till he has fully answered the interrogatories. By the desire of the *Vice-Chancellor*, the motion was mentioned to the *Lord Chancellor*, when his Lordship observed, that if the order rendering the third insufficient answer as penal as the fourth had never been acted upon, it could not at the distance of one hundred and twenty years, be put in force. Upon this intimation of the *Lord Chancellor's* opinion, the *Vice-Chancellor* made the order for the discharge of the defendant. (*b*)

The fourth answer was then referred for insufficiency upon the original exceptions, and the Master reported it to be insufficient. The plaintiff then obtained the usual order, that the defendant should be examined upon interrogatories, and should stand committed; which was in

(*a*) Beam. Ord. Cha. 317. (*b*) 1 Sim. and Stu. 72.

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the following terms,—"Forasmuch as this Court was this present day informed by Mr. *Parker*, of Counsel for the plaintiff, that the fourth answer of the defendant *John Balfour* hath been reported insufficient, by Mr. *Cox*, one of the Masters of this Court, as by the Master's report, dated this day, now produced, appears; It is therefore ordered, that the said defendant *John Balfour* be examined upon interrogatories before the said Master, to the points wherein the said defendant's answer is reported insufficient, and that he do stand committed to his Majesty's prison of the Fleet until he shall perfectly answer the said interrogatories, and this Court make other order to the contrary.

Before the defendant could be taken into custody, exceptions were taken on his part to the Master's report of the insufficiency of the fourth answer, and a motion was made on his behalf; that the plaintiff might be restrained from re-issuing or otherwise enforcing any process of contempt against him, until after the exceptions to the Master's report should have been heard.

Mr. *Hart* and Mr. *E. R. Daniel* for the motion.

Mr. *Agar* and Mr. *Parker* against it insisted, that whilst the defendant was in contempt, and was keeping out of the way to avoid process, the Court ought not to entertain the motion, but that the defendant ought at least to place himself in such a situation, as to be amenable to process, if the Court thought fit not to discontinue it.

The LORD CHANCELLOR.

Exceptions to the Master's report of the insufficiency of a fourth answer,

If the defendant will render himself amenable to the process of the Court, I will hear the exceptions immediately, but otherwise I will not discontinue the process until the exceptions are heard. On the fourth answer

being reported insufficient, the Court gives credit to the Master's report, and it is a motion of course that the defendant shall be examined upon interrogatories, and stand committed. The order of the Court, that the defendant shall be examined upon interrogatories, is good for nothing, (if it turns out that the Master's report is right) unless the defendant is in such a situation, as that the plaintiff may put in execution the process of the Court against him, if the Court thinks that it ought to be enforced.

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ordered to be heard immediately, upon the terms of the defendant's rendering himself amenable to process.

The motion having been refused, the defendant rendered himself amenable to process, by appearing upon the floor of the Court, and the exceptions were then brought on for argument.

Mr. *Hart* and Mr. *E. R. Daniel* in support of the exceptions.

Mr. *Agar* and Mr. *Parker* against them.

In the course of the judgment upon the exceptions, the following observations were made by

The LORD CHANCELLOR. *Feb.* 6.

In forming my judgment upon these exceptions, I have thought it my duty to inform myself of the contents of the first and second answers, with a view to see, whether the contents of those answers, being coupled with the contents of the third and fourth answers, the bill upon the whole is so perfectly answered, as ought to be considered satisfactory; because I take it for granted, that a party who has put in a fourth answer, has a right to say, he will have the Court decide whether that fourth answer is sufficient, not by looking at the fourth answer only, but by looking at the fourth answer, connected and taken

Sufficiency of a fourth answer to be decided upon, not by looking at the fourth answer only, but

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with the three preceding answers. In this case I believe I may lay aside both the first and second answers, because I apprehend they do not even affect to give any answer at all to the interrogatories out of which the exceptions arise. The question therefore is to be considered with respect to the third and fourth answers only. The defendant by his third answer admits, that he has in his possession custody or power, a number of accounts letter-books &c., the particulars of which he has set forth in a schedule to the answer; and he goes on to state, that he believes a number of books of accounts &c. are in the Island of *Tobago*, or elsewhere in the *West Indies*, but he does not state, whether the last-mentioned books of account &c. are in his possession custody or power. The omission is extremely material, for if the defendant had admitted the books &c. in the *West Indies*, to be in his possession custody or power, the plaintiff might have made a motion, calling upon the Court to order the defendant to produce all the accounts books &c., as well those mentioned in the schedule, as those in the *West Indies*, and the Court would have done so, at the same time making this distinction, namely, it would have ordered those in the schedule to be produced forthwith, but with respect to those in the *West Indies*, it would never have done so absurd a thing as to call for them immediately, but would have ordered the defendant to bring them here within a reasonable time, and if he had not got them here within a reasonable time, would have considered it the same, as if he had had them here in the first instance, and had refused to produce them. (*a*) So that the third answer, even so far as this passage goes, was clearly insufficient. The *Lord Chancellor* then observed upon other passages, in which he considered both the third and fourth answers to be insufficient, and concluded by remarking, that there was a material passage in the last answer, in which the

by looking at it, connected and taken with the three preceding answers.

Where a defendant admits books in the *West Indies*, to be in his possession custody or power, the Court will order him to bring them here within a reasonable time, and if they are not brought, will consider it the same as if he had them here in the first instance, and refused to produce them.

(*a*) Freeman *v.* Fairlie, 3 Meriv. 44.

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Papers belonging to a defendant are in his possession custody or power, although they may be in the *West Indies*.

defendant stated, that he had not the *West India* papers writings &c. in his possession custody or power, because they were then coming over to this country; but that he was perfectly of opinion, that they were in the possession custody or power of the defendant, and had been ever since the institution of the suit, for that if they actually belonged to the defendant, though they might be in the *West Indies*, they must be in his possession custody or power.

Pending the argument of the exceptions, the defendant was kept in custody at an hotel in the neighbourhood of the Court, and after the exceptions were overruled, the *Lord Chancellor* observed, that if the plaintiff meant to exhibit interrogatories, he must do so immediately, and desired, that in the mean time the defendant should continue in the same species of mitigated confinement, to which he had before been subjected—Very extensive interrogatories having been exhibited on the part of the plaintiff, for the examination of the defendant, and having been handed up to the Court; Mr. *Hart* and Mr. *E. R. Daniel*, on the part of the defendant, submitted, that the interrogatories must refer directly to the points in which the answer was defective, and ought to be settled by the Master; and they mentioned a case of *Burton* v. *Wilkinson*, in which a defendant, who was in contempt for non-compliance with an order for the production of books, was examined upon interrogatories, and stated, upon the authority of the Counsel concerned in that cause, that the interrogatories were settled by the Master. Mr. *Agar* and Mr. *Parker* for the plaintiff, on the other hand insisted, that the interrogatories ought not to be confined strictly to the points on which the exceptions were sustained, but might be extended to matters consequential upon those points, and they urged the inconvenience of referring it to the Master to settle the interrogatories, inasmuch as, if the parties were dissatisfied with the judg-

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ment of the Master, there might be an appeal to the Court, and the party in contempt must continue in custody pending the appeal.

The LORD CHANCELLOR.

Feb. 22. The inclination of my opinion is, that the interrogatories should go to the Master to be settled—care must be taken, that they go directly to the points, to which the exceptions are sustained; and it will be for the Master to judge, whether they have a direct reference to those points or not. I never recollect, in all my experience, a case, in which the fourth answer was insufficient, and therefore I do not know that it has been laid down, that the Master should in such a case settle the interrogatories; but if the point is new, it appears to me that it is very much to the purpose, that the interrogatories should be settled by the Master.

Feb. 27. The following order was made by the *Lord Chancellor*; —Whereas by an order, dated the 23d of *January* last, it was ordered, that the defendant *John Balfour* should be examined upon interrogatories before Mr. *Cox*, the Master to whom this cause stands referred, to the points wherein his answer was reported insufficient, and that he should stand committed to his Majesty's prison of the Fleet until he should perfectly answer the said interrogatories, and this Court make other order to the contrary; and whereas in pursuance of the said order, interrogatories have been exhibited before the said Master, and the same have been perused by the Right Honourable the *Lord High Chancellor* of *Great Britain*, and in the presence of Counsel learned on both sides, his Lordship doth this day order, that it be referred to Mr. *Cox*, the Master to whom this cause stands referred, to settle the interrogatories upon which the defendant *John Balfour* is to be examined.

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In pursuance of the last order the interrogatories were settled by the Master. They were strictly confined to the points to which the exceptions were sustained, but required from the defendant a much more minute and particular discovery as to those points, than was called for by the original bill.

March 13.

The defendant having been permitted to continue in mitigated custody, from the time when the exceptions were brought on for argument, a motion was now made on the part of the plaintiff, that the defendant might be ordered to attend before the Master to answer the interrogatories personally, or if he did not, that he should stand committed to the Fleet.

Mr. *Agar* and Mr. *Parker* in support of the motion.

Where the examination is upon interrogatories, after a fourth insufficient answer, it must be taken personally. In *Gower* v. Lady *Baltinglass*, (*a*) which was the case of

(*a*) 1 Ch. Cas. 66. The only orders to be found in the register, which appear to relate to the insufficiency of the answers in this case, are subjoined:—

Whereas by an order of the 1st of *March* last,* taken upon the arguing exceptions put in by the defendant to the reports made in this cause by Sir *Justinian Lewis*, Knight, &c., whereby the said Master had reported the 4th answer of the defendant the Lady *Baltinglass* to be insufficient, it was ordered, that the said defendant the Lady *Baltinglass* should forthwith attend the said Master, and bring in upon her oath before him all the writings, which by her answer she offered to do, to be perused and examined by the said Master, who was to certify the Court thereof; and as to the deed of settlement and counterparts thereof, therein mentioned, and the powers therein contained, the leases and counterparts thereof, and rents thereupon reserved, the said Master was to examine the said defendant upon interrogatories to be preferred by the plaintiffs, and upon the Master's report such further order should be taken as should be meet; and in the mean time the judgment of the Court as to the said defendant's fourth answer was suspended; in pursuance of which order the said

* 1665. 26th *May*.

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a fourth insufficient answer, the court not only considered that the examination ought to be personal, but refused to permit Lady *Baltinglass*'s Counsel to be present at the examination, or to permit her to have a copy of the inter-

Master, by his report dated the 12th of *May* instant, certified the said defendant the Lady *Baltinglass* had attended, but refused to obey the said order; whereupon the said plaintiff upon the 24th of *May* aforesaid moved for the defendant the Lady *Baltinglass*'s commitment to the prison of Fleet, her fourth answer being reported insufficient, and upon hearing of the said defendant's Counsel, who alleged the interrogatories to contain two sheets of paper of matters of law, the Court then pronounced an order, which is not yet drawn up, for the said defendant to be examined before the said Master upon the said interrogatories, and bring in the said writings upon oath within four days, or to stand committed, and if the said Master should think fit, the said Lady was to have Counsel present upon her examination; now upon opening of the matter this present day unto this Court, by Mr. Serjeant *Maynard* and Mr. *Solicitor General* being of the plaintiff's Counsel, in the presence of Mr. *Churchill* and Mr. *Vincent* being of the defendant's Counsel, the said plaintiff's counsel now moved, and offered divers reasons to explain the said orders so pronounced as aforesaid, that the said defendant the Lady *Baltinglass* ought not to have Counsel to attend the said Master, it being against all precedent, and that the said defendant may perform the said order of the 1st *March* aforesaid within four days, or may stand committed, whereunto Counsel for the said defendant insisted, that the said interrogatories were of great length, and did contain matter of law which the said defendant the Lady *Baltinglass* could not answer without the advice or assistance of her counsel; upon debate whereof, and hearing what was alleged on either side this Court doth order, that the said defendant the Lady *Baltinglass* shall attend the said Master, and perfect her examination according to the said order of the 1st of *March* last, within four days next after the entry thereof, or in default thereof to stand committed to the prison of the Fleet, and if upon her examination the said Master shall find matter of law contained in the said interrogatories, and shall so direct, then the said Master is at liberty to hear the defendant's Counsel to such points only, but the defendant's Counsel is not to be present in the room at the time of the defendant's examination.

[Reg Lib. A. 1664. fol. 699.]

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rogatories. In *Anon. Mosely* 86, an application was made to the Court, that a defendant, who was in Ireland, might have a commission to examine him in writing as to a contempt, he being out of the jurisdiction, and not ca-

Upon opening of the matter this present day* unto the Right Honourable the Lord High Chancellor of *England*, by Mr. *Solicitor General*, Mr. Serjeant *Maynard*, and Sir *Edward Turner* of Counsel with the plaintiff, in presence of Mr. *Attorney General* and Mr. *Churchill* of counsel with the defendant, and upon reading of a report made in this cause by Sir *Justinian Lewin*, Knt. &c., dated the 17th day of this instant, in pursuance of an order of the 26th *May*, pursuant to an order of the 1st *March* last, whereby it was ordered that the defendant the Lady *Baltinglass* should be examined by the said Master upon interrogatories to be preferred by the plaintiffs, touching the deed of settlement and counterpart thereof, and the powers therein contained, the leases and counterpart thereof, and the rents thereupon reserved, and the Master hath by his said report certified, that he appointed several times for the taking of the same, at most of which the said Lady had attended, and having spent many hours at each time had dispatched the four first interrogatories relating to the deed of settlement or *tripartite Indenture*, but as to the four subsequent interrogatories touching the lease and writings, the defendant the Lady *Baltinglass* was not pleased to be examined, upon being as she affirmed advised by her counsel, that she was not bound to answer the same, having brought in the trunk of writings upon oath according to the order in that behalf, and therefore, and in regard the said Lady doth refuse to be examined on the said interrogatories, it was prayed, that she may stand committed to the prison of the Fleet, but the counsel of the defendant the Lady *Baltinglass* insisted, that she had brought in all the deeds and writings in her custody upon oath, and so cannot have a fuller answer, whereupon, and upon reading the interrogatories not answered unto, and hearing what could be alleged on either side, his Lordship declared, that she ought to be examined thereupon, and answer the same, and doth therefore order, that the said defendant the Lady *Baltinglass* do in eight days next attend the said Master, and be examined on the said four subsequent interrogatories, and perfect her examination thereupon, or in default thereof she is then to stand committed to the prison of the Fleet without further motion.

Reg. lib. A. 1664. 761.

* 1665, *June* 23.

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pable of being examined personally; the application was granted, but the case shews, that according to the course of the Court, the examination ought to have been personal. In The *Welsh Company* v. *Moor*, (*a*) an application for a copy of interrogatories relating to a contempt was refused, which leads to the conclusion, that an examination by parol must have been intended. By these cases it appears, that it is not unusual to have a personal examination in courts of equity. There is a modern case of *Colson* v. *Graham*, in a court of law upon this subject. The parties agreed to a reference to arbitration, and one of the terms of the order made at *Nisi Prius* was, that no bill in equity should be filed. A bill was filed, and the Court of law treated it as a contempt. Interrogatories were exhibited in the Crown Office to examine as to the contempt, and the examination was personal. If the defendant is to be at liberty to put in an examination in writing, there will be no use in the order for an examination before the Master, it will have the effect only of producing a fifth insufficient answer.

Mr. *Hart* and Mr. *E. R. Daniel* against the motion.

It has always been understood, that the records of this Court should contain all the proceedings in every cause, regularly taken in writing, so as to enable the Court at any time to form a judgment upon those proceedings. The interrogatories being in writing, they must be answered in writing, and before the defendant is permitted to swear to the answers, they must be looked over by the Master, and if they appear to be defective, the Master must order them to be altered. Every defendant has a right to have access to the Court to correct the judgment of the Master;—How is that access to be had, if the examination is to be by parol? In *Burton* v. *Wilkin-*

(*a*) 1 Dick. 336.

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see the examination to the interrogatories was put in in writing. If the defendant is to be examined personally, it will be necessary for him to have a written examination with him, as a memorandum for the purpose of refreshing his memory.

The LORD CHANCELLOR.

The ordinary rule of the Court in cases of contempt is, that there shall be a personal examination of the party, but whether that rule applies to cases where the fourth answer is insufficient, is another matter. In ordinary cases of contempt, there is not much difficulty in examining personally, because the examination applies to a fact, or to the intention, but there may be great difficulty in examining a party personally to such interrogatories as the Master has settled in this case; nevertheless if the practice is, that the examination shall be personal, though there may be difficulty in it, that practice must be preserved, and therefore I must see the orders in *Gower* v. Lady *Baltinglass*, before I decide this point.

The ordinary rule of the Court in cases of contempt is, that there shall be a personal examination of the party.

The LORD CHANCELLOR.

March 22.

I have seen the orders in *Gower* v. Lady *Baltinglass*, and it appears to me, (though I cannot deliver myself from the opinion that it is a very inconvenient mode of proceeding) that a defendant, standing in the situation in which the present defendant stands, instead of putting in a written examination, is to be examined personally. The orders in that case appear to me to shew, that according to the strict practice of the Court, the Master is to settle the interrogatories, the party is to attend the Master, and upon the interrogatories the Master is personally to examine the party. With respect to the order for Counsel not being at liberty to attend the party before the Master, I should be extremely

The defendant may be attended by Counsel upon his examination before the Master.

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unwilling to follow any such precedent as that; there are here four insufficient answers, and each of those four answers was drawn with the advice of Counsel, it is said that the defendant is now to amend those answers upon an examination on interrogatories; surely therefore it is a hard thing to say, that he is not now to have the benefit of the continued advice of his Counsel. According to the rule, as laid down in the case of Lady *Baltinglass*, the Court does not preclude the defendant from having the assistance of Counsel, but it is said Counsel are to be in the next room, to be consulted on matters of law;—Who is to judge of the points on which the advice of Counsel is to be called in? Is it to be supposed that the defendant is capable of drawing nice distinctions between matters of fact and matters of law? I think the Master may be safely entrusted with hearing Counsel on both sides. The supposition that a personal examination before the Master, is as likely to elicit truth, as an examination by Counsel, putting such questions as occur to their minds in the course of the examination, appears to me to be founded in mistake; for after the Master has settled the interrogatories, he cannot put any fresh question, as Counsel might do in the course of a parol examination. I do not mean to say that these are not very proper interrogatories, but it certainly would be impossible for any man to answer them without previous preparation, which alone shews, that a personal examination here, is not at all analogous to the *viva voce* examination of a witness. I cannot help strongly recommending to the parties, that the mode of proceeding be this, that Mr. *Balfour* be allowed to put in a written examination to these interrogatories, and then to attend before the Master, for the Master again to put to him each or any of the questions which he may think have not been sufficiently answered. If however the plaintiff will not consent to that mode of proceeding, I cannot order it. It has been argued that the defendant will be entitled to have his examination in his hand, in the same

Personal examination in equity is not analogous to the *viva voce* examination of a witness.

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manner as a witness might have,—I think that he may have his examination in his hand, and for purposes, for which perhaps a witness would not be permitted to have it, for I apprehend that if a witness knew what questions were to be put to him, he would not be permitted to have in his hands in writing such answers as he considered he would give to those questions. All that can be done is, to send it to the Master to put these questions to Mr. *Balfour*, and if I were Mr. *Balfour*, I would have a written memorandum of what answers I was determined to give to those questions.

The order for the personal examination of the defendant, after reciting the order of the 23d of *January* 1823, and that the defendant had since remained in the custody of the tipstaff, attending the Court, and further reciting the order of the 27th of *February* 1823, and that in pursuance of that order the Master made his report, dated the 13th of *March* 1823, and thereby certified, that he had settled the interrogatories, proceeds in the following terms; —"It was therefore prayed, that the said defendant *John Balfour* may attend before the said Master, at his chambers, to be examined upon the said interrogatories, or in default thereof that the said defendant may thereupon, without further motion, stand committed to, and be confined in close custody in his Majesty's prison of the Fleet, until he shall submit to and be examined before the said Master upon the said interrogatories, and perfectly answer the same, and this Court make other order to the contrary; whereupon, and upon hearing Mr. *Hart* and Mr. *Daniel* of Counsel for the said defendant, the said order of the 23d of *January* 1823, the said order of the 27th of *February* 1823, and the said Master's report of the 13th of *March* 1823, his Lordship doth order, that the said defendant *John Balfour* do personally attend Mr. *Cox*, one of the Masters of this Court, and be examined upon the interrogatories exhibited by the plaintiff, and the said

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Master is to be at liberty to repeat the said interrogatories, or any of them to the said defendant *John Balfour*, as he the said Master may think fit.

Mode of conducting the personal examination of a defendant upon interrogatories after a fourth insufficient answer.

The following mode of examination was adopted by the Master:—A written answer to the interrogatories was prepared and carried in by the defendant to the Master; the Master compared the answer with the interrogatories, and then determined, whether or not it was satisfactory. In the points in which the Master considered the answer to be unsatisfactory, the defect was supplied by the personal examination of the defendant, till the Master was of opinion, that the answer was sufficient. The plaintiff had no notice of the defendant being under examination, and did not attend before the Master.

On the 27th of *March* 1823, the Master made the following Report:

In pursuance of an order of the High Court of Chancery, dated the 23d of *January* 1823, whereby, after noticing that the fourth answer of the defendant *John Balfour* had been by my report, dated the said 23d of *January* 1823, reported insufficient, it was ordered, that the said defendant *John Balfour* should be examined upon interrogatories before me, to the points wherein the said defendant's answer was reported insufficient, and that he should stand committed to his Majesty's prison of the Fleet until he should perfectly answer the said interrogatories, or the Court make other order to the contrary; and also in pursuance of another order of the said Court, dated the 27th of *February* 1823, whereby, after taking notice of the before-mentioned order of the 23d of *January* 1823, and after stating that in pursuance of the said order interrogatories had been exhibited before me, and that the same had been perused by the *Lord High Chancellor*, it was referred to me to settle the interrogatories, upon which the defendant *John*

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Balfour was to be examined; and likewise in pursuance of another order of the said Court, dated the 22d of *March* 1823, whereby, after stating the two several beforementioned orders, and my report of the 13th of *March* 1823, whereby I certified that I had settled the said interrogatories, it was ordered, that the said defendant *John Balfour* should personally attend me, and be examined upon the interrogatories exhibited by the plaintiff, and whereby I was to be at liberty to repeat the said interrogatories, or any of them, to the said defendant *John Balfour* as I should think fit; I have been attended by the said defendant *John Balfour* in person, and have taken his examination thereto, pursuant to the said lastmentioned order, and which examination appears to me to be full and sufficient, and the same now remains in my office; all which I humbly certify to this honourable Court.

Sam. C. Cox.

Mr. *Hart* and Mr. *E. R. Daniel* this day moved, upon the Master's report that the examination was satisfactory, that the defendant might be discharged out of custody, and contended that the judgment of the Master was final. *March* 27.

Mr. *Agar* and Mr. *Parker* for the plaintiff insisted, that the Court ought not to discharge the defendant, till the plaintiff had seen the examination; and objected to the mode in which the examination had been conducted by the Master, contending, that each of the questions contained in the interrogatories ought to have been distinctly put to the defendant by the Master, and that the plaintiff ought to have had notice of the examination, and had a right to be present at it.

The LORD CHANCELLOR.

If the plaintiff has not seen the examination, he must The defendant is

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not to be discharged out of custody, upon the Master's report of the sufficiency of his examination, till the plaintiff has seen the examination.

The object of the Court, in directing the defendant to be examined upon interrogatories is, that upon that examination, he shall not be liberated out of custody, till he has given a sufficient answer not only to the questions contained in the bill, to which he has not before answered, but to every question, which the Master thinks may fairly arise out of the matter, which may be contained in the answers to those questions, without putting the plaintiff to the trouble of amending his bill.

undoubtedly see it, before the defendant is discharged. Where a defendant puts in four insufficient answers, the consequence is that he is taken into custody, and the Court orders that he shall be examined upon interrogatories; the object of the Court is, that upon that examination, he shall not be liberated out of custody, till he has given a sufficient answer, not only to the questions contained in the bill, to which he has not before answered, but to every question which the Master thinks may fairly arise out of the matter, which may be contained in the answers to those questions, without putting the plaintiff to the trouble of amending his bill. The Master has done all, which from the nature of the case he could do, with respect to the examination of the defendant; he has taken every pains to execute the duty which the Court imposed upon him. The mode of examination which he has adopted, is quite as satisfactory, as if he had put the questions to the defendant, one after another, in which case he never could have got a sufficient answer at all. I am perfectly satisfied, that if the strict practice, which the counsel for the plaintiff call upon the Court to pursue, had been pursued, the lives of ten men would not have been sufficient to answer such interrogatories as these. No Court which examines *viva voce* would permit such complicated questions to be put. My opinion is, that the plaintiff had no right to hear any thing about this examination. I apprehend the examination goes on, just as if a further answer was to be put in, about which further answer the plaintiff could know nothing at all.

[*April* 11.]

The defendant by his examination having referred to two schedules, containing a list of deeds and letters respectively in his possession; the counsel for the plaintiff insisted upon their right to a production of the documents mentioned in the schedules, before the defendant was discharged; and the *Lord Chancellor* said, that they had a

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right to see all the documents referred to in the examination, if they were so referred to, that in the case of an answer, they would have made part of the answer.

After the documents had been produced, Mr. *Agar* and Mr. *Parker* for the plaintiff contended, that the examination was insufficient, and argued, that they had a right to shew the insufficiency of the examination, as cause against the discharge of the defendant.

[*April* 12.]

The plaintiff has no right to notice of the defendant's examination.

The *Lord Chancellor* doubted, whether he had any right to discuss the sufficiency of the examination, in the form proposed by the counsel for the plaintiff; and suggested, that the proper course might be, to discuss the question upon the old exceptions, with respect to any of the original interrogatories in the bill which remained unanswered, and upon new exceptions, with respect to any new questions which the Master might have introduced in settling the interrogatories, and which the plaintiff might consider not to be sufficiently answered. His Lordship expressed a wish to hear counsel on the point; but the counsel for the defendant not entering into any detailed argument upon the subject, the question of insufficiency was ultimately discussed, upon the motion for the discharge of the defendant.

***Semble*, The proper mode of discussing the insufficiency of the defendant's examination is, upon the old exceptions, with respect to any of the original interrogatories in the bill remaining unanswered, and upon new exceptions, with respect to any new questions, which the Master may have introduced in settling the interrogatories.**

Mr. *Agar* and Mr. *Parker* in shewing cause against his discharge, contended, that the examination was not only insufficient, but that it was manifestly false, and inconsistent with what had been sworn by the defendant in his previous answers, and that the defendant therefore ought not to be liberated out of custody, till he had put in another examination.

[*April* 22, 24, 26, 29. *May* 1.]

The insufficiency of the examination however was in this case permitted to be shewn as cause against the defendant's discharge.

Mr. *Hart* and Mr. *E. R. Daniel* for the defendant.

This Court only keeps a defendant in custody, for the

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purpose of securing to the plaintiff a perfect answer; and this defendant, having fully answered the interrogatories, is therefore entitled to his discharge. If the Court adopts the principle, that any inconsistency which may exist between the defendant's answers, and his examination, is a ground for detaining him in custody, he never can be discharged at all; as no future information which he can give, can be consistent with both his answers and his examination, if they are inconsistent with each other.

An examination may be quite sufficient, though it is untrue, and inconsistent with what has been sworn by the defendant in his answers.

The principle of the Court is, that the plaintiff must be satisfied, with what the conscience of the defendant allows him to swear.

In the course of the argument The *Lord Chancellor* repeatedly observed, that it was not the truth or consistency of the examination that he was bound to insist upon. That the examination might be quite sufficient, though it might not be true, and that in deciding upon the question of sufficiency, the principle of the Court was, that the plaintiff must be satisfied, with what the conscience of the defendant would allow him to swear, for that the Court could give him no more; that if the plaintiff wished to try the truth of the examination, he must treat it in a different manner, for that although there might be a probability, that that which was sworn was not true, yet that it must be taken to be true, and it was not within the jurisdiction of the Court to try, whether it was true or not. Upon the subject of inconsistency his Lordship also observed, that though the examination might be inconsistent with the answers, still it might be sufficient; for that if two answers contained inconsistent representations, no further answer could possibly be sufficient, if inconsistency formed a ground for considering it to be insufficient, as if a further answer was received, it might be inconsistent with the first answer, and agreeing with the second, or inconsistent with the second answer, and corresponding with the first, but could not be consistent with both the answers; and that

inconsistency therefore did not go to the point of insufficiency.

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May 3.

The *Lord Chancellor* said, he thought that the examination, taking it altogether, would be sufficient; if the defendant would make an affidavit, that he had not in his possession, and had no recollection of the contents of a letter, which he had set forth in some of the earlier proceedings in the cause with so much particularity, as to induce the belief that it must at that time have been in his possession; but to which he had not adverted in his examination upon the interrogatories.

The defendant on the 5th of *May* made the affidavit required by the *Lord Chancellor*, and extended it to account for certain deeds, relating to the estates in question, which were in the possession of a person, who had offered to assist the defendant by producing them.

May 6.

Mr. *Agar* and Mr. *Parker* for the plaintiff now contended, that the deeds in the hands of the defendant in this country, ought to be open to the inspection of the plaintiff; and that the defendant ought not to be released out of custody, till he had given security for the production of the West India papers, when they should arrive.

The *Lord Chancellor* said, that with respect to the deeds in this country, the plaintiff must have the inspection of them; and that for the purpose of securing that inspection, he would order them to be deposited with the Master. With respect to the papers in the *West Indies*, his Lordship said, that he could make no order at present, but that upon a motion for that purpose, he should have no difficulty in ordering the defendant to produce them within a given time, and if they were not produced in conformity to the order, he would again take the defendant into custody, or in the event of his leaving the

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country, would lay his hands upon the estate. That he considered the estate as a security for the production of the papers, and would not therefore compel the defendant to give any other security.

The Counsel for the defendant then admitting, that the West India papers had arrived in this country, since the examination was put in; and not desiring to put the plaintiff to a motion for the production of them; the following order was made for the discharge of the defendant.

His Lordship doth order, that the defendant *John Balfour* do deposit with the Master upon oath, the deeds books papers and writings, mentioned respectively in the schedules to his third and fourth answers, and in the schedules A. and B. to his examination to the plaintiff's interrogatories, and the deeds of the 15th and 16th days of *June* 1804, and the deed of the 16th day of *July* 1804, mentioned in his affidavit sworn the 5th day of *May* instant, and thereupon, and upon his paying the plaintiff's costs charges and expenses already taxed, and giving security to be allowed of by the Master for the payment of such further costs charges and expenses of the plaintiff as the Court shall award; it is ordered, that he be discharged out of custody as to his said contempt; and it is ordered, that the defendant *John Balfour* do, on or before the 20th day of *May* instant, deposit with the said Master, all such of the deeds books papers and writings, stated by him to have been in the *West Indies*, or to be on their way from thence to this country, as have lately arrived, and been received by him, with such affidavit as he may be advised to make in respect thereof; and it is ordered, that the said defendant do, on or before the first day of *November* next, deposit with the said Master the remainder of the said deeds (if any) books papers and writings last abovementioned or referred to, to be verified by affidavit.

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LECHE *v.* Lord KILMOREY. (*a*)

ROLLS.
May 4.

Before *Graham* Baron, and Masters *Cox* and *Harvey*, for the *Master of the Rolls.*

A sum of money was paid by *A.* to *B.*, for the purpose of purchasing *C.* promotion in the army, and it remained unapplied in the hands of *B.* at the death of *A.* *C.* having been compelled from the bad state of his health to quit the army, and having no prospect of being able to enter into the service again, filed a bill for the money, and it was decreed to be paid to him.

THE plaintiff *James Leche*, being a lieutenant in the 86th regiment of foot, of which Lord *Kilmorey*, then General *Needham*, was colonel, *William Leche* paid the sum of 1050*l.*, into the hands of Messrs. *Cox* and *Greenwood*, army agents, to the account of General *Needham*, accompanied by the following note: Gentlemen, I inclose 1050*l.*, to be placed to the account of General *Needham*, and to be at his disposal, for the use of Lieutenant *James Leche* of the 86th regiment. The 1050*l.* was paid to General *Needham*, for the purpose of purchasing the plaintiff rank in the army, when an opportunity should offer, and it remained in the hands of *Cox* and *Greenwood*, at the time of the death of *William Leche*. After his decease the plaintiff, having been compelled from the bad state of his health to quit the army, and having no hopes of being again able to enter into the service, filed this bill, in the year 1822, against Lord *Kilmorey*, and against the representative of *William Leche*, stating the facts abovementioned, and alleging that the money was paid to General *Needham*, with a direction, that until it could be laid out in purchasing promotion, it should be invested on good securities, and the interest paid to the plaintiff, and that several small sums of money had been actually paid to the plaintiff in respect of such interest; the bill therefore prayed, that the plaintiff might be declared entitled to the payment of the said

(*a*) *Ex relatione* Mr. Wigram.

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sum of 1050*l.*, and the interest due thereon, and that the same might be paid to him accordingly.

The defendant Lord *Kilmorey* by his answer denied, that any directions were ever given respecting the laying out the 1050*l.* at interest, or that the plaintiff was entitled to the interest, or that he had ever been paid any money in respect thereof, and stated, that he had been advised, that when the plaintiff left the army, he forfeited his right to the principal and interest.

The other defendant claimed the 1050*l.* and interest as the representative of *William Leche.*

Mr. *Sugden* and Mr. *Wigram* for the plaintiff cited, *Barlow* v. *Grant,* (*a*) *Nevill* v. *Nevill,* (*b*) *Barton* v. *Cooke,* (*c*) *Hammond* v. *Neames.* (*d*)

Mr. *Wray* for the representative of *William Leche.*

GRAHAM, Baron.

The intention of the donor was evidently to make a provision for the plaintiff, but still if the plaintiff had died in the lifetime of the donor, the donor, and not the personal representative of the plaintiff, would have been entitled to the money. The plaintiff however, as far as he has been able, has co-operated with the intention of the donor, and the circumstance that the money was left in the hands of the army agent till the death of the donor, is a strong circumstance, from which to infer his intention, that the plaintiff should take the money absolutely.

The decree was made according to the prayer of the bill.

(*a*) 1 Vern. 255.
(*b*) 2 Vern. 431.
(*c*) 5 Ves. 461.
(*d*) 1 Swanst. 35.

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ATTORNEY GENERAL *v.* LORD HOTHAM.

ROLLS.
June 9—10—12.

Upon an information to set aside a lease for ninety-nine years of charity lands, the defendants the lessees set up a title adverse to the lease; upon the merits it was held, that there was no ground for the defence, but the Court was of opinion, that if the merits had been otherwise, the defendants were estopped, and could not dispute the title. while they retained the possession.

Semble. The lessees ought not to have been permitted to enter into evidence, upon the principle that the plea of *nil habuit in tenementis* could not have been pleaded at law.

A mere husbandry lease of charity lands for ninety-nine years at an uniform rent cannot be supported.

THIS information, which was filed at the relation of the churchwardens and overseers and some of the inhabitants of the parish of *East Moulsey*, stated, that there had been from time immemorial situate within the said parish certain enclosed lands, called the *Hale* and *Hale-Platts*, which were many years since conveyed by the then owners thereof for the use and benefit of the said parish, and that the said lands, although the conveyance thereof had been lost, had from time to time been let by the inhabitants of the said parish assembled in vestry, and that the rents and profits of the said lands had from time immemorial been received by the churchwardens and overseers of the said parish, and applied in the repairs of the church, in the maintenance of the poor, and in other parochial purposes in aid of the rates.

The information then stated, that in the year 1767 the lands in question were demised by the then churchwardens of the parish, with the consent of the overseers and other inhabitants of the parish in vestry assembled, to *Thomas Sutton* and *Susannah Norman*, the owners of the adjoining lands, for the term of twenty-one years, at the yearly rent of 31*l.* 10*s.*, subject to a covenant that they would not dig, plough up, or convert into tillage, or sow with any kind of grain, the demised premises, or any part thereof, or lop or top any of the trees thereon; and it further stated, that upon the expiration of the abovementioned lease in the year 1788, the said lands were (at a vestry of the parishioners) again demised to the said

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Thomas Sutton, for the benefit of himself and *Sir Beaumont Hotham*, (who had become entitled to the interest of the said *Susannah Norman* in the adjoining lands) for the further term of twenty-one years, at the like rent of 31*l.* 10*s.*, and subject to the like covenants as were contained in the first mentioned lease.

The information next stated, that the said *Thomas Sutton* died shortly after the date of the last mentioned lease, and that upon his death the benefit of such lease became vested in *Sir Thomas Sutton* his son, and that at a meeting of the inhabitants of the parish in their vestry, held on the 30th *July* 1789, it was agreed that the lease of the *Hale* lands granted to the said *Thomas Sutton* in the year 1788 should be cancelled, and a new lease thereof granted to the said *Sir Thomas Sutton*, for the term of ninety-nine-years, at the like rent and subject to the like covenants as were contained in the former lease, and that such new lease was accordingly executed by the then churchwardens of the parish to the said *Sir Thomas Sutton*.

The information then stated the death of *Sir Thomas Sutton* in 1813, and that by virtue of his will the defendants claimed to be entitled to the beneficial interest in the *Hale* lands for the residue of the said term of ninety-nine years, and it then set forth an act of Parliament, passed in the year 1815, by which Commissioners were appointed for dividing and inclosing the commons and waste lands in the parishes of *East* and *West Moulsey*, and were empowered to hear and determine any dispute, which might arise between any parties interested in the said division and inclosure concerning the respective shares and proportions which any of them should claim in or to the lands and grounds thereby directed to be divided and inclosed: but it was provided by the act, that nothing therein contained should extend to enable the said Commissioners to

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determine the title to any messuages lands tenements or hereditaments whatsoever, or to determine any right between any parties contrary to the possession of any such parties, except in cases of encroachment made within the period of twenty years, but that in case the Commissioners should be of opinion against the right of the person or persons so in possession, they should forbear to make any determination thereupon, until the possession should be given up by or recovered from such person or persons, by ejectment or other due course of law. The act of Parliament contained a clause, by which parties aggrieved were enabled to appeal to the general quarter sessions which should be holden for the county, within two calendar months next after the cause of complaint should have arisen, on giving notice of such appeal to the Commissioners and the parties concerned.

After further stating, that from the year 1779 the lessees of the *Hale* lands had been also lessees under the crown of the manor of *East Moulsey*, and that the said manor had been recently purchased from the crown by the defendants; the information stated, that the *Hale* lands were treated by the Commissioners under the act of Parliament as common lands, and as such were allotted to the defendants, and it charged, that shortly previous to the expiration of the lease granted to *Thomas Sutton* and *Susannah Norman* in the year 1767, the said *Thomas Sutton* set up a claim to the said lands, insisting that the same were part of the waste lands and commons of the manor of *East Moulsey*, and that in consequence of such claim it was deemed advisable to take the opinion of counsel, and that a case was accordingly stated, and the facts in such case approved of and agreed to by the said *Thomas Sutton*, and his solicitor, and that the said case was laid before *Mr. Serjeant Hill* for his opinion, and that he gave an opinion in favour of the title of the parish to the said lands.

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After further charging, that in case the *Hale* lands were formerly part of the waste lands of the manor of *East Moulsey*, they were not enclosed therefrom within the space of twenty years previous to the passing of the act, and that the Commissioners had no authority to allot the same to the defendants, the information submitted, that the defendants could not derive any title to the said lands under the said inclosure, or any allotments of the same made by the Commissioners, and it prayed, that the lease granted in pursuance of the said agreement of the 30th day of *July* 1789 might be declared to have been improvidently and improperly granted by the then churchwardens and overseers of the parish of *East Moulsey*, and that the same might be declared to be null and void, and might be delivered up to be cancelled; and that the defendants might be decreed to deliver up the possession of the said lands to the churchwardens of the said parish, and to account with them for the rents which had accrued due for the same subsequently to the 25th of *December* 1816, (to which time it was admitted by the information that the rents had been paid) and that the defendants might also be decreed to deliver up all deeds papers and writings relating to the said lands, or any part thereof.

The defendants by their answers denied, that the *Hale* lands had ever been conveyed for the use of the parish, and insisted that the freehold thereof, as parcel of the manor of *East Moulsey*, until the allotment under the act of Parliament mentioned in the information, was vested in the Crown; and after setting forth an extract from the Parliamentary Survey of the Crown lands taken in the year 1649, containing a description of a piece of land called the *Hale* as part of the common and waste lands belonging to the manor of *East Moulsey*, and also setting forth an extract from the Court Rolls of the said manor in 1661, purporting to be an order of the Court baron regu-

lating the mode in which the commoners were to enjoy rights of common on the *Hale*, the defendants stated, that shortly previous to the year 1710 the practice began of some person solely occupying the *Hale*, and paying for the benefit of the parish a yearly sum of money by way of compensation for the right of common thereon to which the parishioners were entitled, and that by degrees the parishioners in vestry assembled assumed the right of letting the said lands. The answers admitted that a lease of the *Hale* lands had been executed to *Sir Thomas Sutton*, and that upon his death the beneficial interest in such lease became vested in the defendants, and that they and those under whom they claimed had for fifty years held the said lands under the parish, and had during the same period been the lessees of the manor, and then went on to admit that the defendants had lately purchased the manor, and that the act of parliament was passed as stated in the information, and after further stating, that the commissioners appointed under the said act had determined the *Hale* lands to be part of the common and waste lands which they were authorized to allot, and had allotted the same to the defendants, and also stating, that to the belief of the defendants the said lands were not enclosed from the commons and waste lands within the period of twenty years, or any other period of time previous to the passing of the act of parliament, but continued parcel thereof up to the time of their being allotted in manner aforesaid; the defendants submitted, that the Commissioners had authority to divide and allot the said lands, and that their allotment was final and conclusive, inasmuch as no person had appealed therefrom in the manner prescribed by the act of parliament, and they insisted that the allotment could not be impeached by the Court, and claimed the same benefit of the objection as if they had made it by plea or demurrer.

The evidence on the part of the informants consisted

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principally of a series of entries in the parish books, which were made evidence by being in every instance authenticated by the parties interested in the manor, and which proved that the *Hale* lands had from the year 1710 been uniformly dealt with as the separate property of the parish; the case laid before *Serjeant Hill* stated many of these entries, and also stated, that *Thomas Sutton* the lessee of the *Hale* lands, being also lessee of the manor, permitted the timber on the *Hale* to be cut and applied for the use of the parish. The facts stated in this case were admitted to be evidence in support of the information under the following circumstances. It was proved that in the year 1787, when the case was laid before *Serjeant Hill*, *Thomas Sutton* was lessee of the manor; and *Henry Swann* deposed, that in the abovementioned year, he had frequent communications with the said *Thomas Sutton* for the purpose of settling the then existing disputes as to the title of the parish of *East Moulsey* to the *Hale* and *Hale Platts*, and that it was at first proposed to submit the matter to arbitration, and that various communications were had on the subject, and that at length when the necessary facts relating to the matters in dispute were ascertained, it was concluded, that instead of proceeding to arbitration the opinion of *Serjeant Hill* should be obtained, and that every means were used, by making searches and otherwise, to ascertain the facts to be stated in the case prepared for the opinion of the said *Serjeant Hill*; and that the statement of facts in the said case was known to and approved of by the said *Thomas Sutton*, and his solicitors; the witness then deposed, that a case after much altercation and dispute was prepared for the opinion of the said *Serjeant Hill*, and that his opinion was taken thereon, and that such opinion was communicated or made known to the said *Thomas Sutton*, the said case and opinion having been in his possession. The witness further deposed, that he did himself, within a very short time after the said opinion was

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procured, communicate the purport thereof to the said *Thomas Sutton*, and had several communications with him afterwards upon the subject thereof, and that such case and opinion were on several occasions and at several different times, the subject of discussion with the said *Thomas Sutton* in the presence of the deponent, and that the said *Thomas Sutton* submitted to and acquiesced in the said opinion, by consenting to the calling of a vestry of the said parish of *East Moulsey* for the purpose of re-letting the said lands, and agreeing at such vestry to take the said lands upon lease for twenty-one years. The lease of the *Hale* lands to Sir *Thomas Sutton* for ninety-nine years, dated the 18*th November* 1789, was also produced on the part of the informants.

The defendants gave in evidence the parliamentary survey, and the Court Rolls of the manor, but they did not shew any act of ownership or enjoyment following up these documents; they also proved the inclosure act and the award.

Mr. *Horne* and Mr. *Pepys* for the relators.

The object of this information is to deal with the defendants simply as tenants; the Court will not look at the title of the defendants independent of the lease, it will not permit them to take advantage of a possession which they have obtained as lessees, for the purpose of asserting a title which they cannot have except in opposition to the rights of their landlord. If the question of title can be introduced at all, it is proved that the parish has been in the habit of letting these lands for upwards of a century; it must thereby have acquired an indefeasible title against all the world; it is not pretended that there has been possession following up the statement in the parliamentary survey; and these lands having been enjoyed by the parish for a period very far exceeding twenty years the Com-

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missioners, by the terms of the act of parliament, had no authority to allot them; if the defendants are to be considered as the lessees of the parish, it is quite clear that a mere husbandry lease of charity lands for ninety-nine years cannot stand.

Mr. *Shadwell* and Mr. *Temple* for the defendants.

When a lessor proceeds adversely against his lessee for the purpose of setting aside the lease, he dissolves the relation of landlord and tenant, and it is competent to the lessee to protect himself if he can by disaffirming the title of his lessor; the parish has had only a qualified possession of this land, they have held it as common lands, and their title is destroyed by the act of parliament. It is proved that in 1641 the lands belonged to the Crown, and as the Crown can grant only by matter of record, if there had been a conveyance to the parish it could have been produced. The act of parliament has pointed out a particular mode of appeal, and the jurisdiction of the Court is therefore excluded.

The MASTER OF THE ROLLS.

In giving my judgment upon this case I shall consider it in three points of view, first as it presents the case on the part of the relators, considered as distinct from the case made by the defendants; and secondly with reference to the case on the part of the defendants, branching out into two distinct grounds of defence. With respect to the first view of the subject it is unnecessary to make any observations upon it, because the relief sought by this information is quite according to the ordinary practice of the Court with respect to charity lands; it is too clear to admit of any doubt, that a husbandry lease of lands belonging to a charity, for ninety-nine years, at an uniform rent, cannot stand, unless some satisfactory reason can be

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given to support it; and in the present case, the fact of the lease for ninety-nine years having been substituted for one of twenty-one years, without any agreement being made for an increase of the rent according to the change of circumstances, or any obligation being imposed upon the tenant to lay out any money upon the estate, is quite conclusive against the lease.

The difficulties therefore which belong to this subject arise out of the case made by the defendants; admitting that they were lessees for ninety-nine years, they contend that the property is changed, and that they are no longer bound by the terms of the contract; to support that position two grounds are taken, First it is said that if the act of parliament had never passed, the lands in question would not now have been the separate property of the parish, but common waste lands belonging to the manor of *East Moulsey*. It is attempted to make that out by adducing the parliamentary survey and the Court-rolls of the manor, and it is contended that those documents furnish strong evidence to shew, that in the years 1649 and 1661 these lands belonged to the manor. Both the documents adduced are undoubtedly deserving of great consideration; the parliamentary survey in particular is entitled to considerable weight, from the accuracy with which it is known to have been taken; but it is to be observed that the evidence is documentary; we do not know that on the survey being taken it was attended by the persons claiming these lands as their property; the parliamentary surveyors may have been mistaken, and with respect to the Court-rolls of the manor, taken by themselves they are evidence only against the tenants of the manor and the lord of the manor. It is competent to the Court Baron to enter upon their records my land to be their common, and I have no means to dispute it; their record therefore is of itself but *ex parte* evidence, and does not of necessity bind third persons. The first thing the Court looks at as the crite-

The court-rolls of a manor, taken by themselves, are evidence only against the tenants of the manor, and the lord of the manor.

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rion of property is usage and enjoyment. Ancient deeds are exceedingly material if followed up by possession, but if not followed up by possession, and if there has been a long enjoyment and uninterrupted possession in opposition to them, they lose that importance to which they would otherwise be entitled. Very high judges have said they would presume any thing in favour of a long enjoyment and uninterrupted possession. Suppose this case was now submitted to the consideration of a jury, and the parliamentary survey and the Court Rolls of the manor were produced to shew that these lands belonged to the Crown, and no other evidence was produced to prove that fact; and on the part of the parish the parish books were produced, containing these different entries, and it was proved that the parish had been in the quiet enjoyment and uninterrupted possession of this property for one hundred and ten years,—would not that be conclusive? Is not sixty years possession a title against the Crown? Is not one hundred and ten years possession sufficient to put an end to any claim as to this property? We must suppose that persons who have a right to property will assert that right, and if they lay by for one hundred and ten years, and suffer the property to be enjoyed by other persons, that enjoyment must constitute right. I cannot have the least hesitation in saying, that whatever may have been the origin of the possession of these lands by the parish, that possession, coupled with the circumstance that the party who it is said is entitled, has been standing by and making no objection to the property being enjoyed as the separate property of the parish, must decide the question; and that we must consider these lands as having been originally granted to trustees for the benefit of the parish, and to be enjoyed by them as their separate exclusive property.

Presumption of law in favour of long enjoyment, and uninterrupted possession.

The second part of the case made by the defendants is, that the act of parliament gave the Commissioners juris-

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Where a limited tribunal takes upon itself to exercise a jurisdiction which does not belong to it, its decision amounts to nothing; and does not create any necessity for an appeal.

diction to decide the question with respect to these lands, but I am clearly and decidedly of opinion that they had no jurisdiction at all, and that they were expressly prohibited from interfering or meddling in any manner with this subject; it follows as a matter of course, if they had no jurisdiction, that their decision is a nullity; it does not create any necessity for an appeal, where a limited tribunal takes upon itself to exercise a jurisdiction which does not belong to it; if it decides upon matters, with respect to which it has no authority, its decision amounts to nothing, and no party can in the least be bound by it.

There is therefore no ground of defence upon which the right of the relators to the property in question can be resisted; but there is a feature in this case which Courts of justice have always considered it their duty to mark with the strongest censure; that the tenant, instead of endeavouring to protect and support the title of his landlord, has done all in his power to impeach it. If there is one principle more established than another with respect to the relation between landlord and tenant, it is this, that if a tenant receives the possession of an estate from a landlord, he never can dispute the title of that landlord. There are instances where under peculiar circumstances Courts of justice, when third persons have been interested, have let the tenant in to shew that the person to whom he has paid rent was not entitled to receive it; (*a*) but even in such cases it has always been done with the very greatest caution. With respect to the principle, it is the first maxim for every tenant to understand, that so long as he retains possession, he cannot dispute the title of the person who gave him that possession. There have been cases in which it has been evident that the landlord had no title, and yet the Court would not hear the tenant say so, as for instance in the case of the *Bedford Level*, (*b*)

(*a*) Rogers *v.* Pitcher, 6 Taunt. 209. (*b*) 6 East 536.

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where they wanted to shew that the lease was good for nothing because it was not registered, when the tenant came to state that, his evidence was not allowed to be received.

It has been decided a hundred times over, that the tenant cannot plead the plea of *nil habuit in tenementis*, and that the plaintiff in cognizance or in avowry is not called upon to shew his title; it would be contrary to the principle upon which the relation between landlord and tenant exists, to allow the tenant to dispute his landlord's title; for there is an implied covenant that the landlord shall protect the tenant's enjoyment, and the tenant shall guard the landlord's title. If the merits of this case had been otherwise the defendants were estopped; if they wished to dispute the title of their landlord they ought to have given up the possession; I almost doubt whether they ought to have been permitted to enter into evidence at all, upon the principle that the plea of *nil habuit in tenementis* could not have been pleaded at law; but for the purpose of meeting the justice of the case, I was unwilling to exclude the evidence. Upon the whole view of this case, I have not the least doubt but that the relators are entitled to the relief they pray; the consequence is that the lease must be declared null and void, that possession must be delivered up, and that there must be an account of the rents according to the true value; and the defendants must pay all costs.

The following decree was made.

His Honour doth declare, that the lease, dated the 18th day of *November* 1789, of the charity lands and premises in the pleadings mentioned, called the *Hale* and *Hale Platts*, for the term of ninety-nine years, granted in pursuance of the agreement of the 30th day of *July* 1789 in the pleadings mentioned, is void, and doth decree the

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same accordingly; and his Honour doth order and decree, that the defendants do deliver up the said lease to the relators *William Greening Martin* and *William Annison*, the churchwardens of the said parish of *East Moulsey*, to be cancelled, and that the said defendants do deliver up possession of the said charity lands with the appurtenances, and all other the premises comprised in the said lease, to the said *William Greening Martin* and *William Annison* as such churchwardens as aforesaid; and his Honour doth order and decree, that it be referred to the master to take an account of the rents of the said lands and premises, which have accrued due since the 25th of *December* 1816, and which have been received by the said defendants, or by any other person or persons by their or either of their order or for their or either of their use, and in case it shall appear upon taking the said account, that the said defendants or any or either of them have been in the occupation of any part of the said lands and premises since the said 25th of *December* 1816, or if the said master shall not be able to ascertain what rents have been received in respect of such lands, the said defendants are to be charged in taking the aforesaid account according to a valuation to be set thereon by the said master; and it is ordered that the said master do consider what is a reasonable rent to be paid by the said defendants during such time; and it is ordered that the said defendants be charged therewith accordingly; and it is ordered that what shall be found due on taking the said account be paid by the said defendants to the said *William Greening Martin* and *William Annison* as such churchwardens as aforesaid, and it is ordered that the said master do enquire and state whether the said defendants, or any of them, have in their or any of their possession custody or power, any and what deeds documents books accounts evidences or writings belonging to the said lands, and it is ordered that the said defendants do deliver the same to the said *William Greening Martin* and *William An-*

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nison as such churchwardens as aforesaid. And it is ordered that the said defendants do pay unto the relators their costs of this suit to be taxed by the said master.

ROLLS.

June 20.

ELIZABETH the wife of JOHN PRICHARD by her next friend . . . . . PLAINTIFF.

AND

GEORGE AMES and the said JOHN PRICHARD . . . . . DEFENDANTS.

Before *Graham*, Baron, and Masters *Alexander* and *Cox*, for the *Master of the Rolls*.

A legacy given to a married woman "for her own use and at her own disposal" vests in her as separate estate.

THE bill in this cause stated, that *Mary Bold* by her will bequeathed to the plaintiff, the sum of 240*l.* "for her own use and at her own disposal," and appointed the defendant *Ames* to be her executor, and gave him full power to receive the residue of her estate for his own use. The bill submitted, that the plaintiff was entitled to the legacy for her sole and separate use, and prayed that it might be paid to her.

The defendant *John Prichard* insisted, that he was entitled to the legacy in his marital right.

Mr. *Sugden* for the plaintiff cited *Kirk* v. *Paulin*, (*a*) where a legacy to a married woman, to be at her disposal, was held to vest in her as separate estate.

(*a*) 9 Vin. Abr. 95 pl. 43.

Mr. *Roupell* for the defendant *John Prichard.*

The intention to give the property to the separate use of the wife must be clearly manifested in order to defeat the marital right of the husband, *Lumb* v. *Milnes.* (*b*) A legacy given to a married woman, "for her sole use and benefit," vests in her as separate estate; *Adamson* v. *Armitage,* (*c*) *Ex parte Ray.* (*d*) But where it is given only for her own use and benefit, the right of the husband is not excluded; *Wills* v. *Sayers.* (*e*) *Roberts* v. *Spicer.* (*f*) The expression "at her own disposal" cannot have a greater effect than the words "for her own use and benefit."

Mr. *Bridgman* for the executors.

Graham, Baron.

I cannot entertain a doubt upon this point; the necessary effect of these words is to give this legacy to the separate use of the plaintiff. The testatrix, in using the words "at her own disposal," has stated the effect she wished to be produced; her intention was to give the plaintiff that power of disposition which the law does not give her. The words "at her own disposal" must be altogether rejected, if they are taken to mean nothing more than "for her own use."

(*b*) 5 Ves. 517.
(*c*) Coop. CC. 283.
(*d*) 1 Madd. Rep. 199.
(*e*) 4 Madd. Rep. 409.
(*f*) 5 Madd. Rep. 491.

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March 22.
July 1.

COPIS *v.* MIDDLETON.

Where two persons execute a bond, the one as principal, the other as surety, and no other assurance is executed at the time, the surety paying the bond debt is a simple contract creditor only of the principal.

THIS suit was instituted by creditors for the administration of the estate of *John Knott*, who died on the 28th of *December* 1792, and by the decree made upon the hearing of the cause, dated the 25th of *November* 1796, it was referred to the master to take an account of the debts of the said *John Knott*, and it was ordered, that the master should enquire and state to the Court, whether the defendant *Newman Knott* had paid any and what debts of the said *John Knott*, as surety for him, or any and what money in respect of any such debts, and whether the said *Newman Knott* received any and what consideration satisfaction or indemnity in respect of any or either of the said debts, and to what extent, together with the nature of such security satisfaction or indemnity.

The master by his report, dated the 20th of *May* 1815, certified, that the specialty debts of the said *John Knott* amounted to 16085*l*., and he further certified, that it appeared by the evidence brought before him, that the said *Newman Knott* became surety for the said *John Knott* to a considerable amount, and paid various sums of money on account of such suretyship, and that he did not find that the said *Newman Knott* received any consideration satisfaction or indemnity in respect of any of such debts. In the schedule to his report the master included the representatives of the said *Newman Knott*, and one *John Martin*, as specialty creditors of the said *John Knott*, in respect of sums paid by the said *Newman Knott* and *John Martin* respectively, in discharge of the principal and interest of certain bonds entered into by them as sureties for the said *John Knott*, and he allowed interest upon such principal sums.

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The bonds in which *Newman Knott* was surety, were dated respectively the 8th of *August* 1781, and the 10th of *January* 1792, and were joint bonds, executed by him and the said *John Knott*, to *Richard Fogden* and *Thomas Turgis* respectively, and were conditioned for securing the respective sums of 800*l.* and 300*l.* The principal and interest remaining due upon these bonds was paid by *Newman Knott* after the death of *John Knott*. The bond in which *John Martin* was surety, was dated the 8th of *October* 1791, and was also a joint bond, executed by him and the said *John Knott*, to *John Boniface*, and conditioned for securing the sum of 250*l.* The principal and interest due upon this bond was paid by *Martin* in the lifetime of *John Knott*, and the bond was assigned to *Martin*.

These facts were brought before the Court by two exceptions taken by the plaintiffs to the Master's report, by which it was insisted, that the Master under the circumstances ought not to have considered as specialty debts, the sums paid by the said *Newman Knott* and *John Martin* in respect of the specialty debts of the said *John Knott*, but ought to have considered such sums as simple contract debts only, and ought not to have allowed interest thereon, inasmuch as the said *Newman Knott* and *John Martin* in making such payments, did, as the plaintiffs submitted, virtually cancel the bonds and specialties, and put themselves in the situation of simple contract creditors of the said *John Knott*.

The cause now came on upon the exceptions.

Mr. *Martin* Mr. *Wingfield* and Mr. *Pepys* in support of the exceptions.

Where a bond is executed by principal and surety, it is quite clear that the surety paying off the debt becomes at

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law a simple contract creditor of the principal. His remedy against the principal is by an *indebitatus assumpsit*, or an action on the case, and he cannot declare upon the bond. Upon what principle then can the surety be converted into a specialty creditor in equity, where there is no contract between the parties that he shall be so considered. The utmost remedy which Courts of Equity have afforded to sureties has been, to give them the benefit of all the continuing securities entered into by the principal for the payment of the debt, but when a bond is paid off all remedy upon it is at an end; the surety cannot even compel an assignment of the bond; *Gammon* v. *Stone*, (*a*) *Waffington* v. *Sparks*. (*b*) There is no principle upon which a Court of Equity can consider the surety as a specialty creditor, and no direct adjudication upon the point can be found in print. The case of *Hotham* v. *Stone*, (*c*) by which the Master considered

(*a*) 1 Ves. 339.

(*b*) 2 Ves. 569.

(*c*) The following note of this case is extracted from the Register:—

HOTHAM *v.* STONE.

On the 12th of *August* 1774 *John Pytt* and *John Platt* executed a joint and several bond to *John Stock*, conditioned for the payment of 1000*l.* and interest, and by a memorandum in writing, bearing even date with the bond, and signed by *Pytt*, it was declared that the name of *Platt* was inserted in the bond as a security for *Pytt*, and at his request, and that no part of the 1000*l.* was received by *Platt*, and *Pytt* promised to indemnify *Platt* against the bond and the interest thereof. In the month of *August* 1775 *John Platt* died, having by his will appointed the defendant *Partridge* to be his executor; *John Pytt* died in *August* 1776, and after his death the principal and interest due on the bond, amounting to 1485*l.*, was paid by *Partridge*, to whom the bond was delivered up.

By the decree in the cause it was amongst other things ordered, that the Master should enquire and state to the Court the priorities of the respective incumbrances, annuities, and specialty debts, affecting the estates in question in the cause.

The Master by his report, dated the 6th of *December* 1809, set forth several instruments by

himself to be bound, is not reported, but there was in that case a special agreement between the parties, and the decision was appealed from, and the appeal compromised; *Robinson* v. *Wilson* (*d*) does not amount to a decision, and the cases there referred to are distinguishable from the present. In *Gayner* v. *Royner* (*e*) the bond appears to have been accompanied by a mortgage; and the circumstances of *Parsons* v. *Briddock* (*f*) shew, that the point in question could not have arisen.

Mr. *Shadwell* in support of the Master's report.

This case must be considered in two points of view, first with respect to the bonds paid in the lifetime of the principal, and secondly with reference to the case where

which *John Pytt* became seized in fee of the estates in question, and stated, that the first incumbrance on the said estates was an annuity of 200*l.* granted by the said *John Pytt* to the defendant *Robert Stone*, and that the second incumbrance thereon was a debt of 400*l.* due to *Richard Bowsher*, by virtue of the said *John Pytt*'s bond, dated the 10th of *October* 1775; and after stating several other incumbrances affecting the said estates, the Master certified, that a state of facts had been carried in by *Partridge*, claiming to have the debt paid by him allowed as the second incumbrance upon the estates in question, but that upon consideration of the claim he had disallowed the same, inasmuch as he humbly conceived that the said debt was not any charge or incumbrance upon the said estates.

The defendant *Partridge* took an exception to the report, insisting that the Master ought to have allowed the claim as the second incumbrance on the estates.

The decree declares, that the defendant *Partridge* is entitled to stand as the second incumbrancer upon the estates in question, and directs an account to be taken of what is due to him for principal and interest by virtue of the bond.

Reg. lib. 1809. A 2. 1335.

(*d*) 2 Madd. Rep. 464.

(*e*) Search has been made for this case in the register, and it cannot be found.

(*f*) 2 Vern. 608.

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the bond was not paid by the surety till after the death of the principal. In the first case, although the bond debt was extinguished at law, the surety would be a specialty creditor, because a Court of Equity would keep alive the bond for his benefit, and on the principle on which it interferes to prevent legal bars from being set up, would permit an action to be brought upon the bond, and restrain the principal from setting up the payment.—[*Lord Chancellor:* Did you ever hear of such an injunction?]—In the other case there is still further reason to consider the surety as a specialty creditor, because it was competent to the creditor after the death of the principal to have proceeded against his estate, and then the surety might have filed a bill to have the benefit of that proceeding. In *Wright* v. *Morley* (*a*) Sir *William Grant* decided, that the surety has precisely the same rights as the creditor. *Robinson* v. *Wilson* is the only case which bears upon the point, and although no final judgment was given, the opinion of Sir *Thomas Plumer* was in favour of the surety. It may fairly be inferred that the principal agreed to indemnify the sureties, and the circumstance of the sureties not having taken counterbonds is a defect in form against which this Court ought to relieve.

The LORD CHANCELLOR.

I take the present case to be simply this, upon loans of money to *A.* joint bonds were given by *A.* and *B.*, *B.* being surety for *A.*, two of the bonds were paid off by *B.* in the lifetime of *A.*; now if one of two joint obligors, being a surety, pays off the debt in the lifetime of the principal, he is at law merely a simple contract creditor of the principal, and if the principal lives for twenty years after the payment of the debt, he continues during all that time to be at law a simple contract creditor only,

(*a*) 11 Ves. 12.

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then the question is, whether by the death of the principal he is to be converted in a Court of Equity into a specialty creditor against his assets. With respect to the bond paid off after the death of the principal, the questions are, whether, inasmuch as at the death of the principal there was money due upon the bond, there was an equity on the part of the surety to compel the creditor to go in against the assets of the principal, and whether, there having been no interposition for that purpose, the right of the surety to stand in the place of the creditor can now be maintained. When it is considered that this was a joint bond, and that no action at law could be maintained except against the surety, the surviving debtor, it is a strong proposition to say, that the surviving debtor is to be considered in equity as a specialty creditor against the assets of the deceased debtor. With regard to the case before Sir *Thomas Sewell* it does not appear to me to bear at all upon the point in question; in that case there was a bond and mortgage, and the cases where there is a bond only and a bond and mortgage are quite different. It is a general rule that in equity a surety is entitled to the benefit of all the securities which the creditor has against the principal, but then the nature of those securities must be considered; when there is a bond merely, if an action was brought upon the bond, it would appear upon oyer of the bond that the debt was extinguished; the general rule therefore must be qualified, by considering it to apply to such securities as continue to exist, and do not get back upon payment to the person of the principal debtor; in the case for instance where in addition to the bond there is a mortgage, with a covenant on the part of the principal debtor to pay the money, the surety paying the money would be entitled to say, I have lost the benefit of the bond, but the creditor has a mortgage, and I have a right to the benefit of the mortgaged estate, which has not got back to the debtor; there is a

It is a general rule that in equity a surety is entitled to the benefit of all the securities which the creditor has against the principal; the rule however must be qualified, by considering it to apply to such securities as continue to exist, and do not get back upon payment to the person of the principal debtor.

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great difference between Sir *Thomas Sewell*'s case as stated in the argument and in the judgment; Sir *Thomas Plumer* says it establishes, that a surety paying a specialty debt has a right to be considered as a specialty creditor of the principal, but that does not at all follow from the statement of the case. There is another distinction between the present case and the case before Sir *Thomas Sewell*, that the mortgage was in that case created at the same time with the bond; so in *Wright* v. *Morley* there was a trust coeval in creation with the suretyship, and the question was, whether the trust fund was not by contract between the parties first to be resorted to. There was no final judgment in *Robinson* v. *Wilson*, which detracts from its authority. The authority of *Hotham* v. *Stone* is as great as that of a single judge can be, but there was an appeal from the decision, attended by a compromise, which seriously affects the case. I confess that I was astonished to hear that it had been decided, that when there was merely a bond, and payment of the bond, without more, the surety was to be considered as a specialty creditor; It was a common thing in bankruptcy, before the late acts of Parliament enabling the surety to prove, for the creditor to go in and prove the debt when the principal became bankrupt, and then the surety took the benefit of the proof, but if the surety paid the debt before the creditor went in, no proof could be made; when the creditor would not prove, some one was found to purchase the bond, an assignment was made, and the purchaser went in and proved for himself.

July 1. The LORD CHANCELLOR.

The facts of this case are simply these, two individuals gave a bond, the one as principal, and the other as surety; no other assurance was executed at the time, no mortgage was made to secure the debt, no counterbond was given

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by the principal to the surety; and the question to be decided is, whether the surety, having paid the bond after it was due, is a simple contract or a specialty creditor. I understand it to have been the opinion of the Master, an opinion founded on one or two cases which have been stated, that the surety was to be considered as a specialty creditor to stand in the place of the person whom he paid; that doctrine appears to me to be contrary to all that has been settled during the whole time I have been in this Court; every thing that was arranged in bankruptcy before the late statute enabling the surety to prove, every thing determined before, appears to me to have authorized the Court to consider it quite clear, that if there was nothing in the case beyond what I have stated, the surety having paid the bond could be nothing more than a simple contract creditor in respect of that payment; the bond was not assigned to any body in consideration of a sum of money paid, which was one way we used to manage these things; there was no counterbond given, which was another way in which we used to manage these things, so that if the surety paid one bond, he became instantly a specialty creditor by virtue of the other bond. If any suit was now instituted, I apprehend the payment of the bond would shew that the bond was gone. There has been a case cited where, upon the general ground that a surety is entitled to the benefit of all securities which the creditor has against the principal, it seems to have been thought, that the surety was entitled to be as it were a bond creditor by virtue of the bond; I take it to be exceedingly clear, if at the time a bond is given, a mortgage is also made for securing the debt, the surety, if he pays the bond, has a right to stand in the place of the mortgagee, and as the mortgagor cannot get back his estate again without a conveyance, that security remains a valid and effectual security, notwithstanding the bond debt is paid; but if there is nothing but the bond, my

Where a bond is given by principal and surety, and at the same time a mortgage is made for securing the debt, the surety, if he pays the bond, has a right to stand in place of the mortgagee.

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notion is, that as the law says that bond is discharged by the payment of what was due upon it, the bond is gone, and cannot be set up. That is the opinion which I have formed of this case.

Exceptions allowed.

June 21.
July 5.

ANGERSTEIN *v.* MARTIN.

Testator, having devised lands to *A.* for life, remainder to his children in strict settlement, directs the residue of his personal estate, subject to the payment of debts and legacies, with all convenient speed to be laid out in the purchase of lands, to be settled forthwith to the same uses, with a proviso, that the trustmonies, until they should be laid out, might be invested upon government or real securities, the dividends and interest of which were to go and be paid as the rents of the lands to be purchased would go and be payable; a large portion of the testator's personal estate, not required for the payment of debts and legacies, being invested in the funds, and upon securities carrying interest, the tenant for life was held entitled to the interest of that portion from the death of the testator.

JOHN Julius Angerstein by his will, dated the 16th of *January* 1823, gave and devised all his freehold estates in the counties of *Norfolk Lincoln* and *Suffolk* respectively, to Sir *George Martin* and *Andrew Henry Thomson* and their heirs, to the use of *John Angerstein* for life, remainder to the uses after mentioned, that is to say, as to the estates in the county of *Norfolk*, to the use of *John Julius William Angerstein*, the eldest son of the said *John Angerstein*, for life, remainder to his first and other sons successively in tail male, remainder to *Frederick Angerstein*, the second son of the said *John Angerstein*, for life, remainder to his first and other sons successively in tail male, remainder to *William Angerstein*, the third son of the said *John Angerstein*, for life, remainder to his first and other sons successively in tail male, remainder to *Caroline* and *Elizabeth*, the daughters

of the said *John Angerstein*, for their lives successively, and to their first and other sons successively in tail male, remainder to the heirs and assigns of the said *John Angerstein* for ever; and as to the estates in the counties of *Lincoln* and *Suffolk* respectively, the testator devised the same, after the death of the said *John Angerstein*, to the like uses, except that the estates in the county of *Lincoln* were first limited to the use of the said *Frederick Angerstein* and his first and other sons successively, and those in the county of *Lincoln*, to the use of the said *William Angerstein* and his first and other sons in like manner. The testator then gave several annuities and pecuniary and specific legacies, and he gave all his stocks funds money securities for money and all the residue of his personal estate, subject to the payment of his funeral and testamentary expenses debts legacies and annuities, to the said Sir *George Martin* and *Andrew Henry Thomson* their executors administrators and assigns, upon trust to sell all such parts of his residuary personal estate as should be in their nature saleable, and to collect and receive all such parts thereof as should not be so, and to stand possessed of the monies to arise from the sale, and also the monies which should be collected, upon trust, as to four tenth parts thereof, with all convenient speed, (with the consent of the said *John Angerstein* during his life, and after his decease with the consent of the person for the time being in possession of the estates in the county of *Norfolk* under the limitations thereinbefore contained) to lay out and invest the same in the purchase of lands, and forthwith to convey settle and assure the lands so to be purchased, to the uses thereinbefore declared of and concerning the said last-mentioned estates; with a proviso, that in the mean time and until the said four-tenth parts of the said trust monies should be laid out and invested in a purchase or purchases in the manner thereinbefore mentioned, it should be lawful for the trustees, with such consent as aforesaid, from time to time to place out and

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invest the same in their names in the public stocks or funds, or upon government or real security at interest, and to alter vary and transpose such stocks funds and securities, and that the dividends interest and annual proceeds arising from such stocks funds and securities, should from time to time go and be paid to such person or persons, and be applied to such uses intents and purposes, and in such manner, as the rents and profits of the hereditaments to be purchased with the monies invested thereon would go and be payable or applicable, in case such purchase or purchases were actually made; and as to three other tenth parts of the said trust monies, and as to the three other remaining tenth parts thereof, the testator directed the trustees to stand possessed thereof, upon trust to invest the same in the purchase of lands, to be settled to the same uses as were thereinbefore respectively limited and declared of and concerning his estates in the counties of *Lincoln* and *Suffolk*, with a like power to invest such monies on such securities as aforesaid, and to vary the same, and the dividends and interest thereof were in like manner to go and be paid to such person or persons as the rents of the hereditaments to be purchased therewith would go and be payable; the testator appointed the said Sir *George Martin* and *Andrew Henry Thomson* to be the executors of his will.

The testator died on the 29th of *January* 1823, leaving the said *John Angerstein* his only son; the several children of the said *John Angerstein* named in the will of the testator were living at the time of his decease, but none of them had any issue.

The testator at the time of his death was possessed of a very large personal estate, consisting, amongst other things, of money in the public funds, and of money due to him on securities carrying interest; and after providing for the payment of his debts and funeral expenses, and of

the legacies and annuities given by his will, the interest of the clear residue of the testator's personal estate in the hands of his executors amounted to many thousand pounds per annum.

The bill was filed by the said *John Angerstein*, within a year after the death of the testator, against his children, the tenants for life in remainder, and against the executors, for the purpose of having the question determined, whether the plaintiff was entitled to the annual interest of the clear residue of the testator's personal estate from the time of his death, or whether the amount of such interest during the first year after the testator's death formed part of the general residue of the testator's personal estate, for the benefit, (after the expiration of the first year) of the plaintiff during his life, and of the devisees in remainder after the decease of the plaintiff; The bill prayed, that it might be declared by the Court, that the plaintiff was entitled to receive and be paid for his life the amount of the annual interest or yearly produce of the clear residue of the testator's personal estate, from the time of the said testator's death; and that if necessary the usual accounts might be taken of the testator's personal estate and effects, and the clear residue thereof ascertained, and secured during the plaintiff's life in such manner as the Court should direct.

The defendants the executors by their answer stated, that the testator was at the time of his death possessed of several sums in the public funds of this country, only part of which could be required for the payment of his funeral and testamentary expenses debts legacies and annuities then remaining unpaid; and that he was also possessed of property to a large amount in the Russian funds, no part of which could be required for the purposes aforesaid; and they further stated, that in case an eligible estate should be offered for sale, they were prepared to advance

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300,000*l.* for the completion of the purchase, and to settle the estate to the uses of the testator's will, and they submitted to the Court, that if such a purchase and settlement had been made, the plaintiff would have been entitled to the rents of the settled estate from the date of the agreement for the purchase.

Mr. *Hart* and Mr. *Barber* for the plaintiff.

If it be the principle of this Court that a will must be construed according to the intention of the testator, it is strange to say, that where the produce of personal estate is given for life, the tenant for life is not to enjoy it during the first year, when the produce of that year may be the whole benefit which the tenant for life may derive from the bequest. In *Stott* v. *Hollingworth* (*a*) the *Vice-Chancellor* held, that the first year's interest of the residue formed part of the capital, but that case was decided without reference to authorities, and the judgment appears to have proceeded upon a supposed resemblance between the case of pecuniary and residuary legatees; without remarking upon the legitimacy of the reasoning in that case, there are many authorities which expressly contrast the case of a pecuniary legacy, with that of a residue. In *Taylor* v. *Hibbert*, (*b*) which follows the decision in *Stott* v. *Hollingworth*, the *Master of the Rolls* seems to have acted upon a mistaken view of *Sitwell* v. *Bernard*, (*c*) which he refers to in the judgment as having established a general rule; the decision in *Sitwell* v. *Bernard* involves no such general rule as has been attempted to be extracted from it; the testator in that case directed an accumulation to an undefined period, the interest of his personal estate to become capital till the purchase of real estate, and the Court only held, that the

(*a*) 3 Madd. 161.
(*b*) 1 Jac. and Walk. 308.
(*c*) 6 Ves. 520.

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testator must have contemplated a time when the accumulation should cease; the reasoning in *Sitwell* v. *Bernard* applies only to cases where the testator has said, the residuary legatee shall not enjoy even the interest till a future time, and not to the converse of that case, where the testator has expressly declared that the residuary legatee shall enjoy the interest from his death. In *Fearns* v. *Young*, (*a*) which is subsequent to *Sitwell* v. *Bernard*, your Lordship declared that there was no rule settled on the point. If the tenant for life, according to a settled rule, can take nothing during the first year, the decision in *Gibson* v. *Bott* (*b*) is erroneous. The rule that a pecuniary legacy shall not carry interest within a year after the death of the testator, when the testator has left the question open, and has not intimated his intention, is only for the convenience of the executor; it is no breach of the duty of an executor, notwithstanding the rule, to pay the legacy within the year, if he is satisfied that the assets are sufficient; the circumstances of this case shew that the testator intended his son to enjoy the property from the time of his death.

Mr. *Pepys* for the children of the plaintiff the legatees in remainder.

There are two ways of considering this case, First whether there is any general rule upon this subject, and secondly whether this case forms an exception to the general rule. The judgment in *Sitwell* v. *Bernard* has always been considered as establishing the principle, that the tenant for life of a residue is entitled to the interest only from the end of a year after the death of the testator; and that principle has been recognized and acted upon in *Taylor* v. *Hibbert*, *Stott* v. *Hollingworth*, and

(*a*) 9 Ves. 549. (*b*) 7 Ves. 89.

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Griffith v. *Morrison*. (*a*) It is true that the will in *Sitwell* v. *Bernard* contained a direction to accumulate, but the Court held, that the direction to accumulate should not operate to the prejudice of the tenant for life, and therefore that it should not operate at all; and then the question arose from what time the tenant for life should be entitled to the interest; the Court determined that he was entitled to the interest from the end of a year after the death of the testator, by analogy to the time fixed for giving interest upon pecuniary legacies. If the first year's interest is given to the tenant for life insurmountable difficulties may arise, as the executors may be involved in debts and liabilities of the testator which require time to be adjusted. There are no circumstances in this case to take it out of the general rule.

Mr. *Martin* and Mr. *Farrer* for the executors.

The LORD CHANCELLOR.

The case of *Sitwell* v. *Bernard* cost me an infinite deal of trouble. My only doubt was whether I was not too bold in overruling the testator's intention, to the extent of restraining the accumulation to one year after his death. In that case I merely decided, that though there was a direction for accumulation, the tenant for life should not be kept out of the interest beyond the year. If I went any further, and gave reason to think that I meant to lay down any such general rule as is now contended for, I can only say, that I did not use my usual caution in guarding myself from being misunderstood. *Sitwell* v. *Bernard* was the very converse of this case; there the testator's personal estate was so affected by circumstances, that it was impossible to bring it together for several years; there was a direction to lay out the capital

(*a*) 1 Jac. and Walk. 311.

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with the accumulation in land; it follows of course that there could be no direction, like that in the present case, that the interest in the mean time should go to the tenant for life. The Master of the Rolls has either mistaken my meaning in that case, or I have mistaken the effect of my own decision; for in *Fearns* v. *Young*, I expressly stated that I did not consider the rule as settled; In *Gibson* v. *Bott* I did not consider that there was any rule against my acting as I did; *Sitwell* v. *Bernard* and *Stott* v. *Hollingworth* differ extremely, there was no direction in the latter case to lay out the money in land, nor any direction as to the interest of the money. I should not have decided *Stott* v. *Hollingworth* without hearing a most elaborate argument on both sides. I must look at the case of *Sitwell* v. *Bernard* before I give my judgment.

July 5.

The *Lord Chancellor* stated the will, and observed that the plaintiff was clearly entitled to the rents of the testator's real estates from the time of his death, and that if the trustees in the course of the year after the death of the testator laid out the whole of the personal estate in the purchase of lands, it would be extremely difficult to say, that the plaintiff would not be entitled to the rents of those lands from the time of the purchase. His Lordship further observed, that the proviso enabling the trustees to lay out the money in the stocks, or upon real security, authorized them to continue it upon existing mortgages, and he then proceeded in the following terms.

I take the cases of *Sitwell* v. *Bernard*, *Entwistle* v. *Markland*, (*a*) and *Stuart* v. *Bruere*, (*b*) not only not to govern this case, but to be directly the converse of it. In all those cases an accumulation was directed, and the intention was, that the intermediate rents and profits till the purchase was made should form part of the monies to be laid out; no person was to take any interest till the trusts

(*a*) 6 Ves. 528. (*b*) 6 Ves. 529.

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with respect to the purchase were completed, and those trusts could not be completed, till the intermediate profits were laid out. In *Sitwell* v. *Bernard* the question was what the Court was to do, where the testator directed the interest to accumulate and be laid out with the principal, and the Court held, that the direction for accumulation should only operate for one year, and that although the personalty remained as personalty, it should at the end of the year be considered as converted; that the beneficial enjoyment should be the same as if the conversion had been made.

That decision appears to me to have been right, even supposing the case to have been an original one, the more so as it followed the previous cases before *Lord Loughborough* and *Lord Thurlow*. The principle upon which the Court proceeded in that case was this, that such a conversion must be made as was most for the benefit of all parties, and that by compelling the trustees to proceed with all diligence to get in the personal estate, to arrest mortgagors, file bills of foreclosure, sue upon bonds, the accumulation would in all probability be much less than if more temperate proceedings were taken; the Court therefore in that case, contemplating all the difficulties which belonged to such a trust, cut the knot and said, that after the end of a year the accumulation should cease, and what was real should be enjoyed as real, and what was personal should be enjoyed as personal. Those cases essentially differ from this, in which the testator directs, that when the personal estate shall be collected, not that the interest thereafter to arise shall be laid out with the principal, but shall be enjoyed by the person entitled to the rents and profits. The question then is, whether, as the testator has given the tenant for life an immediate interest in the real estates, and has directed that if in the course of the year an estate shall be bought, the tenant for life shall be entitled to the rents from the

time of the purchase, although the year has not elapsed, and has also directed as to the personal estate, that it shall be laid out on mortgage, or in the stocks, a direction which would not compel the trustees if they found money on good security to call it in, there can be any inconvenience in saying, that the tenant for life is entitled to the interest of the personal estate from the death of the testator; this case is clearly distinguishable from those to which I have referred, and I think with respect to the interest of so much of the personalty, bearing interest, as is not necessary to be applied for the payment of debts or legacies, the tenant for life is entitled to it from the death of the testator. I know of no case which prevents executors, if they choose, from paying legacies, or handing over the residue within the year, and if it is clear, *currente anno*, that the fund for the payment of debts and legacies is sufficient, there can be no inconvenience in so doing.

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Executors may pay legacies, or hand over the residue, within the year after the death of the testator.

1823.
August 1.
1822.
March 12.

HEWITT *v.* MORRIS. (*a*)

Testator directs his executors to invest the residue of his estate, after payment of debts and legacies, in the funds or upon securities, the interest to be paid to A. for life, and after his death the principal to be held upon trusts for his children; the tenant for life was held to be entitled to interest, accruing within the year next after the testator's decease, upon funds on which the testator's property stood invested at the time of his death, and which were not required for the payment of debts and legacies.

ROBERT HEWITT by his will, dated the 13th of *February* 1810, after giving several pecuniary and specific legacies, gave and bequeathed to his executors the residue of his estate and effects, upon trust to convert into money all such parts thereof as should not consist of

(*a*) From the resemblance of this case to *Angerstein* v. *Martin*, and its importance to the profession, it has been thought convenient to give it immediate publication without regard to the date of the decison.

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money or stocks, and after payment of his debts and legacies, to invest his said residuary estate and effects in the purchase of government or other stocks funds or securities, and to stand possessed of the said stocks funds and securities so to be purchased and acquired, as to one moiety thereof, upon trust to pay the interest dividends and annual proceeds, as and when the same should from time to time arise and be received, to *William Hewitt* for life, and after his death, to pay an annuity to his widow for her life, and subject to the annuity upon certain trusts in the said will mentioned for the benefit of the children of the said *William Hewitt*, and for default of issue of the said *William Hewitt*, then upon the like trusts for the benefit of the children of *John Hewitt*; the testator then bequeathed the other moiety of the said stocks funds and securities to *John Hewitt* for life, with limitations after his decease for the benefit of his widow and children, similar to those before declared as to the first mentioned moiety in favour of the widow and children of the said *William Hewitt*, and he appointed *Thomas Morris*, *George Wren Le Grand*, *James Hartlett*, and *John Munton* to be his executors.

The testator died on the 24th of *September* 1820, and the said *William Hewitt* and *Sarah* his wife, *John Hewitt* and *Anne* his wife, and several children of the said *John Hewitt*, survived him, and joined in instituting this suit against his executors.

By the decree made on the hearing of the cause, on the 12th of *August* 1822, it was referred to the Master to take the usual accounts of the testator's personal estate, and by a separate report, dated the 25th of *February* 1823, the Master certified that all the debts of the testator had been paid. (*b*)

(*b*) It did not appear by the petition, but it was stated at the bar, that the legacies had also been paid.

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The said *William Hewitt* having died without having had any children on the 11th of *February* 1823, and having by his will appointed the plaintiff *Sarah Hewitt* to be his executrix, a petition was now presented by the said *Sarah Hewitt*, and by the plaintiff *John Hewitt*, stating, that the defendants the executors had in hand, on account of the interest accrued due on the testator's estate within the year next after his decease the sum of 374*l.*, which they submitted to pay as the Court should direct; and inasmuch as the said sum of 374*l.* was interest and dividends accrued due on the stocks or funds in which the testator's property was invested at the time of his death, and did not arise from any investment of the testator's estate made by his executors subsequent to his death, the Petitioners submitted, that they were entitled under the trusts of the testator's will to have the same paid to them in equal shares, and prayed that it might be paid to them accordingly.

Mr. *Sugden* in support of the petition argued, that there was a distinction between pecuniary legacies and residuary bequests. He referred to *Angerstein* v. *Martin*, and stated that the decision of the *Vice-Chancellor* in *Stott* v. *Hollingworth* (*c*) was appealed from, and that the case was afterwards compromised.

Mr. *Hart*, against the petition, distinguished the case from *Angerstein* v. *Martin*, there being no direction to lay out the money in land, and contended that there could be no question upon the subject if *Stott* v. *Hollingworth* constituted the law of the court; he mentioned *Taylor* v. *Hibbert* (*d*) and admitted that in *Angerstein* v. *Martin* the Court had expressed an opinion, that *Sitwell* v. *Bernard* (*e*) had no application to the point in question.

(*c*) 3 Madd. 161.
(*d*) 1 Jac. Walk. 308.
(*e*) 6 Ves. 520.

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The LORD CHANCELLOR..

I must read this will; *Sitwell* v. *Bernard* turned entirely upon its peculiar circumstances, and instead of authorizing the decision in *Taylor* v. *Hibbert*, was directly the converse of that case. In *Sitwell* v. *Barnard* there was an express direction that the interest should accumulate, and the Court put a stop to the accumulation at the end of one year; to have come to a contrary decision in *Angerstein* v. *Martin*, I must have gone the length of saying, that if a real estate was bought in *February*, the tenant for life would not have been entitled to the rents. I understand an observation has been made, that that case was an exception out of the general rule, my only comment upon that is, that the general rule never had any thing to do with it.

The LORD CHANCELLOR.

1824.
March 12.

The question in this case is, whether upon the true construction of this will, the tenant for life is to have the interest which proceeds from the fund, so far as it is not necessary to be disturbed for the payment of debts and legacies, from the death of the testator, or whether that interest for the first year is to be added to the bulk of the residue; my opinion upon this will is that the tenant for life is entitled to that interest. *Sitwell* v. *Bernard* appears to have been much misunderstood, at least as to what I meant by it; in that case there was an express direction that the interest should accumulate, and be laid out in the purchase of land, and the question was, not whether the parties to take for life were to take from the death of the testator, but where the accumulation was to stop, regard being had to the fact, that if it was not stopped somewhere the tenant for life might have no benefit at all; the Court could not, against the express directions of the will, say that the tenant for life should

be entitled from the death of the testator, but it being clearly intended that he should have some benefit, it was necessary to fix a time from which he should be entitled; I cannot infer from what I have done in one case as to stopping the accumulation of interest; that the interest is to accumulate in another; I therefore think that the prayer of this petition is right, and must be granted.

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HEWITT v. MORRIS.

ROLLS.

July 7.

CHICHESTER *v.* SHELDON.

Wood springing from the roots or stools of trees is tithable, and neither its own age, nor the age of the trees from the roots or stools of which it sprung, will exempt it.

THIS was a bill filed by the impropriate rector of the parish of *Llanbadarnfaur*, in the county of *Cardigan*, for the tithes of wood. The defendants by their answers insisted, that no tithes of wood of any description within the said parish were due or of right payable to the plaintiff, and stated that they believed, that no tithes had been within the memory of man ever paid or rendered for any wood felled or cut down within the said parish or the tithable places thereof, or within any other parish or place within the said county of *Cardigan*.

The evidence adduced by the plaintiff proved, that the defendants had cut down quantities of wood and underwood, which grew from the roots or stools of trees which had been formerly cut down. On the part of the defendants several witnesses were examined, whose testimony tended to establish a general belief and reputation, that no tithe of wood grown in the parish of *Llanbadarnfaur*, or in the county of *Cardigan*, was due or payable; and it was proved, that a great part of the wood which had been cut down by the defendants was of more than twenty years' growth.

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Mr. *Shadwell* and Mr. *Barber* for the defendants.

The question is whether a sufficient defence may not be made to this suit upon one of these grounds, either that there is a prescription *in non decimando* for the county of *Cardigan*, or that the wood, in respect of which tithe is demanded, sprung from ancient roots, or was of more than twenty years' growth. Upon the latter ground no tithe can be demanded for a great proportion of the wood which has been cut; where such a tree as is timber by the general law of the land, or by the custom of the country, is not cut down till it is upwards of twenty years' growth, the age of the tree exempts it from tithe, and it is immaterial whether it has sprung from an old stool or not. The only question is, whether tithe is due for germins cut down under twenty years' growth, when sprung from the roots of trees not cut down till upwards of twenty years' growth; to bring this point before the court an enquiry must be directed, at what ages the trees were cut down from the roots of which the germins have sprung. In point of law it is quite clear that there may be a prescription *in non decimando* for a county or a hundred; Doctor and Student 325. *Brook's* Abr. Title Dismes, pl. 14. *Coke's* Second Institute 345. *Hicks* v. *Woodson*, 1 Lord Raymond, 137. 4 Mod. Rep. 336. Gwill. 550. There is no reason why this prescription should not prevail for the county of *Cardigan*, as well as for the wealds of *Kent Sussex* and *Surrey*. No objection can be made to the mode in which the prescription is laid by the answer; it is the acknowledged rule, in tithe causes, that it is sufficient if the defendant has so stated his case, as that the plaintiff may know what it is he has to contend with.

Mr. *Sugden* Mr. *Lynch* and Mr. *R. V. Richards* for the plaintiff.

The defence put upon the record is a prescription *in*

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non decimando for the county of *Cardigan*. The answer states merely the fact that no tithes of wood have been paid in the parish or the county; is that the proper mode of pleading a prescription *in non decimando*? The particular ground of exemption ought to have been stated; if a defence thus pleaded is allowed to prevail, the principle of all the cases will be subverted. The only authority in favour of the position, that no tithe is due for germins sprung from roots which originally carried timber trees of more than twenty years' growth, is the passage in the second institute;(*a*) Lord *Hardwicke* has expressly denied the authority of that passage in *Walton* v. *Tryon*; (*b*) and the cases uniformly contradict it. *Turner* v. *Smith* (*c*) *Walbank* v. *Hayward* (*d*) *Lewis* v. *Snell* (*e*) *Ford* v.

(*a*) 2 Inst. p. 43.

(*b*) 2 Gwill. 827. Ambl. 130.

(*c*) 2 Gwill. 529.

(*d*) Wood's Tithe Causes 512.

(*e*) A note of this case which is referred to in *Ford* v. *Racster* is subjoined.

LEWIS *v.* SNELL. In the Exchequer Mich. Term 1811.

The rector of Chingford in the county of Essex claimed the tithes of the parish in kind, and particularly the tithes of wood and underwood, and stated that the defendant Snell was in the years 1806 and 1807 the proprietor of certain woods and pieces of wood grounds lying in the parish, and that in the year 1807 he sold part of the wood therein growing to the defendant Parker, and that both the defendants had cut wood growing as well from old stubbs as from other trees, and had refused to pay any tithes.

The defendants by their answer stated, that since the month of December 1805 the defendant Snell had been the proprietor of several woods in the parish, and amongst others of two groves called Taverner's grove and Pollard's grove, and that in the month of April 1807, being desirous of having all the wood and underwood then standing in the said two groves grubbed up, in order that the same might be converted into arable land, he agreed with the defendant Parker to sell to him all the timber trees pollards and underwood then standing thereon. The defendants further stated, that one of the said groves had been since grubbed up, and that the other was in the act of being grubbed up, and that the wood purchased by the defendant Parker consisted of oak and hornbeam timber, and also of pollards and

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Racster. (*f*) The latter case establishes this point also, that germins sprung from roots, whatever be their age; are subject to tithe; no germin can by age acquire an exemption.

young trees and tellers, and of a small quantity of underwood, and that some of the pollards in the groves had tops of small value, and some of the tellers were from old stubbs, but that an equal quantity thereof were young timber trees sprung from acorns; and the defendants insisted, that the plaintiff could have no right or title to any produce of the said groves and woods, save only as to the said underwood, and as to such tellers as were thereinafter mentioned, such produce having consisted of timber of upwards of twenty years' growth, and of wood growing from old stubbs and stools of timber, and which being about thirty-two or thirty-three years old at the least ought to be deemed and considered as timber, and as such not titheable, and also of pollards, which being of near a century old or thereabouts ought therefore to be deemed and considered as coming within the same denomination; and with respect to the tellers the defendant Snell said, that if any such had been cut down under the growth of twenty years, he submitted that the same were not tithable, by reason that the same were cut down before their maturity merely for the purpose of grubbing up the groves, and converting them into arable land. The defendant Parker then stated that the principal part of the pollards and other wood purchased by him had been sold and used for the purposes of firewood and billet wood.

The plaintiff replied, the defendant rejoined, and witnesses were examined on both sides.

By the decree it was referred to the deputy remembrancer to take an account of what timber trees had been cut down topped or pollarded on the lands of defendant Snell within the parish of *Chingford*, since the defendant Snell came into the possession of the estates and premises whereon the same were growing, which were under the growth of twenty years, and of the value thereof; and also to take an account of what coppice wood and underwood had been cut down by the defendants from the period aforesaid, and of the value thereof; and also to take an account of what germins had been cut by the defendants from the stools of trees above twenty years' growth, and whether any

(*f*) 4 M. & S. 130.

The MASTER OF THE ROLLS.

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Tithe of wood is due of common right.

This is a bill filed by an impropriate rector for the tithes of wood; the title of the rector is proved, and he is therefore *primâ facie* entitled to this tithe, as there can be no doubt upon the authorities that the tithe of wood is due of common right; with respect to underwood and coppice wood particularly it has been determined, that notwithstanding they do not yield an annual increase, yet inasmuch as they are cut periodically, they are in the proper sense articles which yield an increase, and are tithable. In this case therefore it is upon the defendants to shew some reason why they are exempt from the payment of these tithes. The first ground of defence is a prescription *in non decimando*, which is stated in a manner not very usual in cases of this nature, it being alleged merely, that no tithes of the description sought by the bill have ever been paid in the parish, or in the county of *Cardigan*. The first question to be considered is, whe-

and what part thereof had been cut from stools above twenty years' growth mixed and cut with coppice and underwood, and also to take an account of the bark had and stripped by the defendants from any of the trees belonging to the defendant *Snell* since the same period, (except such as were timber trees) and of the value thereof.

The master by his report found, that a large quantity of coppice wood and underwood had been cut down by the defendants since the period in the decree mentioned, to the amount in value of 915*l.*; and he also found, that since the same period a large quantity of germins had been cut down by the defendants from the stools of trees above twenty years' growth, growing upon the said lands, which germins were mixed and cut with coppice and underwood, hornbeam pollards maple young trees tellers and faggot wood: but he stated that no evidence having been adduced before him of the value of such germins, he had been unable to ascertain the same.

The cause was heard on further directions on the 15th of *July* 1816, and a decree was made for payment to the plaintiff of a 10th part of the value of the coppice wood and underwood with costs.

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ther the mode adopted in this answer, is the proper mode of stating such a defence. The Court has never been in the habit of yielding easily to claims of this description; in other cases of customs, where a modus for instance is payable, it is a different thing, there is some equivalent: but where a defendant insists upon paying nothing, it being directly contrary to the law of the land, the Court holds him strictly to make out his title. It is true that the uniform tenor of the books is, that for a district, or even so far as a hundred, a party may prescribe *in non decimando*: but though the doctrine is generally recognized, I know of no instance in which such a prescription has succeeded, except in the three counties of *Kent Sussex* and *Surrey*. Whenever an attempt has been made to resist the right of the rector upon the ground of a prescription *in non decimando*, the Court has been very careful to see, whether the defence was not founded upon an ignorance which prevailed as to the liability to tithes, and not upon any definite legal right. There are several instances of that, Smith *v.* Johnson, (*a*) Nagle *v.* Edwards. (*b*) If defences of this nature were given way to easily, that which proceeds from ignorance might very often be converted into a legal ground of defence, and prescriptions *in non decimando* established in every county in the kingdom. Upon these grounds, where a prescription *in non decimando* is set up, the Court always calls upon the party to shew a legal ground of defence, and to make it out clearly; he must not only state the fact that no tithe is due, or has been paid, but why it is not due, or has not been paid; he must bring forward the specific ground upon which he claims to be entitled to prescribe *in non decimando*. If he make out that it is by custom, he must state the custom, and put it distinctly in issue. In this case the party has stated merely the fact that no tithes have been paid, but has not stated why they have

There may be a prescription *in non decimando* for a district; or even for a hundred.

Where a prescription *in non decimando* is set up, the party must shew the specific ground upon which he claims to prescribe.

(*a*) Gwill. 606.

(*b*) Gwill. 1442.

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Strong evidence required in support of a prescription *in non decimando.*

not been paid. Even if it can be considered that a custom is put in issue, the evidence is too loose to establish it; for that purpose the party ought to have proved the falling of timber in every part of the county, that the exemption was claimed in particular cases, that the attention of the rector was called to it, and that the custom prevailed. There is not therefore a sufficient case made out to establish the claim *in non decimando.* The next ground of defence is, that the trees cut down are of more than twenty years' growth. There is no doubt that if trees be of the description, which by the general law of the land are timber, or which by the usage of the country are considered as timber, those trees, if they have never been cut at all, when cut down above twenty years' growth are not liable to tithe; the doubt is, whether the cuttings from the roots of trees are privileged or not, according as the trees were cut down when above or under twenty years' growth. It is quite clear that so far as applies to the mast of a tree, if it be timber that was never cut at all till twenty years' growth, all its produce to time immemorial will be constantly privileged, because the tree once privileged communicates that privilege to its germins for ever. The difficulty is as to the germins arising from the old stools. In the 2nd institute it is certainly laid down, that the germins from the roots are privileged, as well as those from the mast, but that point underwent very great consideration in *Walton* v. *Tryon*, and undoubtedly it was Lord *Hardwicke*'s opinion that the passage in the 2nd institute was not law; that there was a distinction between the root and the mast; that the privilege did not attach upon the root, and that the germins cut from the old roots were for ever liable. The distinction taken in that case may have been made for the purpose of protecting the rights of the church where they depend upon germins sprung from old stools, it being difficult to ascertain whether the stools belong to trees which did or did not acquire the privilege. Lord *Hardwicke*'s decision in

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Walton v. *Tryon* has been followed in *Walbank* v. *Hayward*, and *Lewis* v. *Snell*; and in addition to these cases there is the very strong authority of a Court of Law upon this subject. In *Ford* v. *Raester* the Court of King's Bench gave a direct decision in point, and this being a clear legal right, a Court of Equity should be cautious of setting up its own judgment against the unanimous decision of a Court of Law. There is a subsequent case of *Evans* v. *Roe* depending in the Court of Exchequer; that case was argued before the very learned Chief Baron, (*a*) who thought that some doubt had been thrown over the authorities, and was desirous that the subject should be brought under the consideration of the whole Court, which I believe has not yet been done. Notwithstanding the authorities to which I have referred, if the parties are anxious to have the point open, whether or not the rule is uniform that the germins must pay, whatever was the age of the tree from whose roots they have sprung, the master may be directed to discriminate the ages of the trees; the defendants however must understand, that if such an enquiry is directed, they will take it at the peril of costs; the enquiry will be attended with expence, and it is a matter for the consideration of the defendants whether, if there is no probability that in the result the Court can contradict the authorities, they will venture to take it. At all events there must be some enquiry, as it is not clear that some part of the wood cut down may not have been timber, above twenty years' growth, and not sprung from old stools.

The defendants afterwards declined taking the enquiry as to the ages of the trees from the roots of which the germins sprung, and the following decree was made.

His Honor doth order and decree, that it be referred to the master to take an account of the tithes of wood which

(*a*) L. C. B. *Richards*,

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has been felled and cut down, and which has been received and taken by the defendants or any or either of them, from the several farms and lands in their joint and several occupation, situate in the parish of *Llandabarnfaur* in the county of *Cardigan*, within six years before the filing of the plaintiff's bill in this cause, and up to the date hereof; and for that purpose it is ordered, that the said master do ascertain how much wood has been cut down by the said defendants as aforesaid, upon the said farms and lands during the time aforesaid, and which sprung from stools or roots of trees, and what is the value thereof; and it is ordered, that the said master do also ascertain how much wood, not growing from the stools and roots of trees, (except oak ash and elm which attained the age of twenty years) has been cut by the said defendants as aforesaid, and during the time aforesaid, and what is the value thereof; and that the said defendants do pay unto the plaintiffs their costs of this suit, to be taxed by the said master, together with what shall be found due from them on taking the accounts aforesaid.

TRIM *v.* BAKER.

July 8.

THE defendants having demurred to the bill in this cause, the demurrer was overruled, and five days afterwards an order was obtained, upon a motion of course, that three of the defendants should have a month's time, and the other defendants, who lived above twenty miles from *London*, six weeks' time to answer the bill. This order was discharged by the *Vice-Chancellor* for irregularity. (*a*)

After a demurrer overruled, an order for time to answer merely, can be obtained only by a special application.

(*a*) 1 Sim. and Stu. 469.

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Mr. *Lovat* now moved, on the part of the defendants, to discharge the *Vice-Chancellor*'s order.

Mr. *Romilly* opposed the motion.

The LORD CHANCELLOR.

It is expedient that this point of practice should be finally settled. In a case which came before me in 1814 I was of opinion, that where a demurrer was put in, which was overruled, the usual orders for time could not be obtained upon motion of course. (*a*) The present *Master of the Rolls*, in a case decided by him, was of a contrary opinion; (*b*) upon the best consideration which I have been able to give this case, I cannot help adhering to the opinion which I originally formed; if a defendant wants time originally, he must apply for time to answer, or to plead answer or demur not demurring alone; the allegation contained in the order is, that the defendant is preparing his answer, a plea being for certain purposes considered as an answer. The question then is, whether, instead of following the usual course, a defendant is to say for himself I will demur alone, and then come to the Court and ask for what it would not have given him originally without imposing a condition that he should not demur alone. It is said that if the demurrer is overruled, unless the order for time is granted upon a motion of course, the party may be immediately attached; my answer to that is that there may be a special application; but then it is said there must be time to make that application; from that I dissent; my opinion has always been, that where demurrer is overruled, the defendant, at the time of the demurrer being overruled, is entitled to submit to the Court a motion for time to answer, and the Court in it

Where a demurrer is overruled, the defendant, at the time of its being overruled, may move for time to answer.

(*a*) *Jones* v. *Saxby*, 1 Swanst. 194.

(*b*) *Griffith* v. *Wood*, 1 Ves. and Beam. 541.

discretion will grant him the usual order for time to answer, or such time as it shall think proper, and will protect him against an attachment, if it ought to do so. It would lead to infinite delay, if a party could demur alone, and then take the orders for time to plead or answer upon motion of course.

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Motion refused with costs.

JOHN WILKINSON and Others - - PLAINTIFFS;

AND

JOHN ATKINSON and MARY ALCOCK, DEFENDANTS. (a)

ROLLS. *July* 15.

Where a testator, resident and domiciled at the time of his death within the province of *York*, disposes of all the residue of his personal estate, and names executors, but his disposition fails as to part of the residue, by the death of one of the residuary legatees in his lifetime, the share which thus becomes lapsed, will be apportioned between the widow and the next of kin, according to the statute of distributions, and will not be affected by the custom of the province.

WILLIAM ALCOCK by his will bequeathed all his personal estate, subject to certain legacies, to the defendant *John Atkinson* and four other persons, upon trust, in the events which happened, to pay his wife the defendant *Mary Alcock*, so long as she should live and continue his widow, an annuity of 200*l*., and subject thereto, upon trust to assign and pay one-fourth part of his personal estate unto *Elizabeth Bramley* her executors administrators and assigns, for her and their own absolute use and benefit; the remaining three-fourth parts of his personal estate the testator gave to certain other persons, and appointed *Atkinson* and his co-trustees to be the executors of his will.

Elizabeth Bramley died in the lifetime of the testator, who left a widow surviving him; at the time of the tes-

(a) *Ex relatione.*

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tator's death he was resident and had his domicile within the province of *York;* under these circumstances the question arose, whether the statute of distributions, or the custom of *York*, was to regulate the apportionment of *Elizabeth Bramley's* lapsed share of the residue between the widow and the testator's next of kin. By the statute the widow would have only a moiety of the share; if the custom prevailed she would be entitled to three-fourth parts of it.

The bill was filed by the surviving and the representatives of the deceased next of kin of the testator at the time of his death, praying, that a moiety of that fourth part of the residue which was given by the will to *Elizabeth Bramley* might be distributed among them according to their respective rights.

The widow by her answer asserted her title to three-fourth parts of the lapsed share.

Mr. *Pemberton* for the plaintiffs contended, that the testator had made a disposition of all his personal estate within the words and meaning of the 4th *William* and *Mary*, c. 2. s. 2., and that the widow was by that act excluded from claiming any thing under the custom.

Mr. *Rolfe* for the widow.

Mr. *Alcock* for the executor.

The cases cited were *Lawson* v. *Lawson* (*a*) *Walton* v. *Walton* (*b*) *Beard* v. *Beard* (*c*) *Southcot* v. *Watson* (*d*) *Middleton* v. *Spicer*. (*e*)

(*a*) 7 B. P. C. 511.
(*b*) 14 Vesey 324.
(*c*) 3 Atkyns 72.
(*d*) 3 Atkyns 226.
(*e*) 1 B. C. C. 204.

The MASTER OF THE ROLLS.

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The question is whether it is not clear, both on authority and on principle, that where an executor is named there is no intestacy; if there is no intestacy the operation of the custom is necessarily excluded. Where an executor is appointed, the legal property in the personal estate of the testator is given completely to him, and in this respect, so far as the present question is concerned, must not equity follow the law? Courts of Equity have never said, that where executors are not beneficially interested in the estate, all the doctrine of intestacy is to be followed up, they have merely declared the executors to be trustees. On principle there is no ground for saying that there is any intestacy in this case, and it is only on the supposition of an intestacy that the operation of the custom can be introduced, for the statute of 4 *William* and *Mary* expressly excludes the widow from claiming under the custom, where the testator has made a complete disposition.

Independently of principle, authority I think has put the matter at rest. *Lord Bathurst's* judgment in *Lawson* v. *Lawson* is a positive decision, and is entitled to the greater weight, because when the point came first before him he entertained a different opinion. It is the latest case, there is no decision against it, and it is strongly confirmed by the language used by Sir *William Grant* in *Walton* v. *Walton*. The passage in which Lord *Hardwicke* is supposed to have expressed a contrary opinion is a mere dictum which has never been followed up. Thus I consider it as a rule fixed both on principle and by authority, that where an executor is appointed the custom does not apply.

The custom of *York* does not apply where an executor is appointed.

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BETWEEN ROGER ADAMSON, JONATHAN FALDER, AND JOHN GASKELL - - - - - PLAINTIFFS;

AND

CLAY HALL - - - - - - - DEFENDANT. (a)

June 28.
July 22.

Where one of several plaintiffs dies before answer, a motion may be made by the defendant, that the surviving plaintiffs shall within a limited time revive the suit, or that the bill shall be dismissed with costs.

THE bill in this cause stated, that the plaintiff *Roger Adamson* was the proprietor of a house at *Liverpool*, of which the plaintiffs *Jonathan Falder* and *John Gaskell* were lessees; and that the defendant *Clay Hall* was the occupier of an adjoining house, and had erected a furnace for boiling soap against the party wall which separated the two houses. The bill then stated, that in consequence of the erection of the furnace, the plaintiffs were in great danger of having their property destroyed by fire, and had been compelled to pay an increased rate of insurance, and the bill prayed, that the defendant might be restrained by injunction from using or suffering the said furnace to be used, for boiling soap, or any other purpose, and also from permitting or suffering the party wall to be or remain in any other state or condition, than the same was in prior to the erection of the aforesaid furnace; and that an account might be taken of all the sums of money paid by the plaintiffs on account of the insurance of the premises, or the goods therein, beyond the rate of insurance paid by them before the erection of the furnace; and that the defendant might be decreed to pay to the plaintiffs respectively, what should be found to have been paid by them in respect thereof.

The injunction, which was moved for upon affidavits, was refused; and after the motion, before any answer was put in, the plaintiff *Roger Adamson* died.

(a) 1 Sim. and Stu. 249.

A motion was then made before the *Vice-Chancellor*, on the part of the defendant, that the surviving plaintiffs might be ordered within three weeks to file a bill of revivor, for the purpose of bringing the representatives of the deceased plaintiff before the Court, or in default thereof, that the bill might be dismissed with costs.

This motion having been refused with costs by the *Vice-Chancellor*, was now repeated before the *Lord Chancellor*.

Mr. *Hart* and Mr. *Pemberton* for the motion relied upon the fact, that the death of the co-plaintiff precluded the defendant from putting in an answer; and insisted that the surviving plaintiffs were bound, either to place the defendant in a condition to try the merits of the cause, or to put him out of Court.

Mr. *Shadwell* and Mr. *Koe* against the motion.

The *Lord Chancellor* did not recollect any instance of a similar motion, but thought that the plaintiffs must submit to have the bill dismissed, or must undertake to revive.

The plaintiffs afterwards elected to dismiss their bill.

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ROLLS.
July 21, 22.

OMMANNEY *v.* BUTCHER.

Testator, after bequeathing to *A.* and *B.* legacies of stock unequal in amount, and giving several legacies to public charities, requests the said *A.* and *B.* to be his executors, and gives to them as such 100 guineas each. He then orders his books jewels plate and household furniture to be sold, and after desiring mourning to be provided for his servants, and 5 guineas each to be given to several persons named in the will and to his two executors for a ring as a token of remembrance, concludes his will in the following manner, "In case there is any money remaining I should wish it to be given in private charity."

BUCKERIDGE Ball Acworth by his will, which was in his own hand-writing, and the commencement of which was in the following form; "I *Buckeridge Ball Acworth*, this—day of *May* 1818, considering in what manner I should have my fortune disposed of in case of my death do make this my will," bequeathed to several persons considerable legacies of stock, and amongst others to the plaintiff *Sir Francis Molyneux Ommanney* 800*l.* bank stock for his life, and after his death to be divided amongst his children, and 600*l.* 3 per cent stock at his own disposal; and to *Andrew Edge* and his wife the interest of 600*l.* 4 per cent stock for their lives, and after their deaths to be divided amongst their children; the testator then gave the following legacies to the undermentioned charities, of which he was a governor or trustee; to St. Margaret's Hospital 600*l.* 4 per cent stock, to the Deaf and Dumb Charity 300*l.* 4 per cent stock, to the Grey Coat Hospital 400*l.* 4 per cent stock, to the Blue Coat School 600*l.* 4 per cent stock, to the Westminster New Charity School 400*l.* 4 per cent stock, to the Western Dispensary 400*l.* 4 per cent stock, to the Westminster Hospital 300*l.* 3 per cent stock, to the Society for propa-

Held, that the general residue of the testator's personal estate, consisting of a leasehold estate, money in the funds, and a balance in cash, was not comprehended in the residuary clause, which was confined to the residue of the produce of the articles which the testator directed to be sold.

That private charity was an object too indefinite to give the crown jurisdiction, or to enable the Court to execute the trust.

That the executors having, as executors, equal legacies, could not take beneficially, and that the next of kin were therefore entitled to the general residue of the testator's personal estate, including what was comprehended in the residuary clause.

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gating the Gospel in foreign parts 100*l.* bank stock, to the Society for promoting Christian knowledge 50 guineas, to the British and Foreign Bible Society 50 guineas, to the Magdalen Hospital 200*l.*; and after disposing of some books and other specific articles he concluded his will in the following manner; I request my cousin the said *Francis Molyneux Ommanney*, and my friend the said *Andrew Edge*, to be the executors of this my will, and give them as such 100 guineas each. I would have my books, except those bequeathed, sold; also I would have my jewels plate and household furniture sold; I desire that my clothes and linen may be divided between my servants, and that they may have handsome mourning given to them; I desire to be given to Mr. *Ellis*, Mr. *George Ellis*, Mr. *Bates*, and Mr. *Sutherland*, and to my two executors, 5 guineas each for a ring, as a token of remembrance; in case there is any money remaining, I should wish it to be given in private charity. *B. B. Acworth.*

The testator died in the month of *August* 1818, and the bill was filed by the executors, against the next of kin and the *Attorney-General*, praying that the respective rights and interests of the plaintiffs and defendants in the residue of the personal estate of the testator might be ascertained and determined by the decree of the Court.

By the decree made upon the hearing of the cause, it was referred to the master to take the usual accounts of the testator's personal estate, and it was ordered, that the master should ascertain the clear residue of the testator's estate, and state of what the same consisted.

The master by his report found, that the clear residue of the testator's personal estate consisted, amongst other things, of a leasehold estate at *Chatham*, of the several sums of 525*l.* bank stock, 750*l.* 4 per cent consols, 4500*l.* 3 per cent consols, 3600*l.* New South Sea annuities,

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1000*l.* New South Sea 3 per cent annuities of the year 1751, of a balance in cash, and of other sums which had arisen from the dividends of the abovementioned stocks.

The cause now came on for further directions.

Sir *G. Wilson* and Mr. *Newland* for the plaintiffs.

The testator in this case has enumerated several public charities as the objects of his bounty, and then he has introduced the words *private charity;* his intention was to draw a distinction between public charity and private benevolence, and to confine the disposition in the latter part of his will to purposes of private benevolence; that intention cannot be carried into effect by the Court or by the Crown; a trust for charitable purposes cannot be executed, unless there is a general disposition to charity, or a specification of such objects as are within the meaning of the statute; (*a*) *Morice* v. The Bishop of *Durham.* (*b*) The expressions used by the testator are so indefinite as to afford evidence that no trust was intended, and the executors are therefore entitled to the residue for their own use and benefit; if they are not entitled beneficially, the trust at all events is of such a nature that the Crown cannot interfere with it, and it must be executed by the executors as they think proper.

Mr. *Wingfield* Mr. *Sugden* Mr. *Roupell* Mr. *Moore* and Mr. *Polson* for the next of kin.

It is quite clear that the executors are not entitled beneficially; equal legacies are given to them in their character of executors, and it was obviously the intention of the testator to create a trust. There are two points; First, To what does the residuary clause refer; Secondly, What is the meaning of the gift. The clause was in-

(*a*) 43 Eliz. c. 4. (*b*) 10 Ves. 522.

tended to include only the residue of the monies arising from the sale of the plate books and furniture, the testator speaks of the sum as contingent; it is impossible he could be adverting to the general residue of his property, which was invested in the funds, and of which he must have known the amount. Several authorities have decided, that the Court will look at the whole of a will for the purpose of ascertaining whether it was the intention of the testator to dispose of the general residue or not; *Davers* v. *Dewes*. (*a*) *Attorney-General* v. *Johnstone*. (*b*) *Page* v. *Leapingwell*. (*c*) It is manifest upon the face of this will that it is an unfinished instrument; the expression used by the testator is, "in case there shall be any money remaining;" it is only in the preceding clause that he has directed the conversion of certain articles into money; there is no direction that all the property shall be so converted. The Court is driven to one of these two constructions, either that the money remaining means only the residue of the money arising from the sale directed in the preceding clause, or that a general gift of any money which might belong to the testator was intended; and taking the latter view of the case, it is quite clear that stock will not pass under a gift of money. *Hotham* v. *Sutton*. (*d*) With respect to the meaning of the words used by the testator, the context of the will shews, that private charity was intended to designate something distinct from the objects pointed at by the testator in the early part of his will, namely, charities of a public nature; private charity is synonimous with benevolence; and it is impossible therefore to distinguish this case from *Morice* v. *The Bishop of Durham*, (*e*) and *James* v. *Allen*. (*f*) There is no authority that a trust for private charity can be carried into execution. In *Waldo* v. *Caley*, (*g*) which

(*a*) 3 P. Williams 40.
(*b*) Ambl. 577.
(*c*) 18 Ves. 463.
(*d*) 15 Ves. 319.
(*e*) *Ubi sup.*
(*f*) 3 Meriv. 17.
(*g*) 16 Ves. 206.

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was a mixed case, the bequest being for the promotion of charitable purposes as well of a public as of a private nature, the trust was supported in respect of the reference to public charity. It is not because the word "charity" is used, that there is a sufficient designation of the subject matter to authorize the Court to devote the fund to charitable purposes. *Vezey* v. *Jameson*. (*a*) *Morice* v. *The Bishop of Durham* is an authority, that if the Court cannot execute the trust, the executors are trustees for the next of kin.

Mr. *Shadwell* and Mr. *Mitford* for the Crown.

The questions in this case are, whether there is any gift to charity at all; what is the extent of the gift; and whether the distribution of the fund is to vest in the Crown, or forms a trust to be administered by the Court; the legacies given by the testator to charitable institutions afford a construction to the words *private charity;* the intention of the testator was, that the residue of his property should be applied to private charities, in opposition to those, which in the early part of his will are made the objects of his bounty, namely, charities administered by means of public institutions; charities of a nature strictly private have been carried into execution by the decree of the Court; in *Goffe* v. *Webb* (*b*) and *White* v. *White* (*c*) bequests for the benefit of poor relations were sustained as charities. The question in these cases is, not whether there are existing objects of charity pointed out specifically, but whether the objects pointed out are of such a nature, that if they do exist the charity may be exercised towards them. In *Waldo* v. *Caley* it was as much the intention of the testator to benefit those who were capable of receiving as objects of private charity, as those who were objects of public charity. If there are charitable purposes expressed, the circumstance that the objects are

(*a*) 1 Sim. and Stu. 69.
(*b*) Duke, Charitable Uses, 8vo edition, 361.
(*c*) 7 Ves. 423.

ate nature, is not sufficient to authorize the Court re that the trust shall not be carried into execu- *lorice* v. *The Bishop of Durham* and *James* v. ere determined upon the ground that benevolence mean charity at all. In *Vezey* v. *Jameson* there trust which the Court could execute; the execu- l power to apply the money in such manner and they should think fit. It does not necessarily that where a testator has directed money to be charity, he intends that it shall be distributed by f public institutions. If the Court can uphold osition as a gift to charity, the question arises the words of the residuary bequest are to be con- as pointing out the residue of the particular fund, eneral residue of the personal estate. Cases of :ription must be decided by the words of the par- ill. The words "money remaining" do not par- refer to the money to arise from the sale of the id plate; where a man has disposed of part of his estate, and uses the expression "money re- " he must, generally speaking, be understood to the general residue of his property. In *Legge* v. (*a*) where the testatrix expressed herself thus;

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1823, *July* 8.

the settlement made marriage of the late Sir nd Lady *Asgill*, dated of *December* 1755, the *Charles Asgill* cove- hat in the event of the *Asgill* surviving him, e being issue of the living at the time of se, his executors should stees the sum of 10,000*l.*, st to pay the interest to *gill* for life, and after se, in the event which of there being two or more children of the marriage, upon trust to pay the said sum of 10,000*l.* to such one or more of the said children, and in such shares and proportions, as the said Sir *Charles Asgill* during his life, or the said Lady *Asgill* after his decease, should by deed or will appoint, and in default of appointment to all the children equally.

There was issue of the mar- riage between the said Sir *Charles* and Lady *Asgill* four children,

Testatrix, by her will disposes of certain long annuities, and of a sum in cash, and then uses the following words; "I believe there will be sufficient money left to pay my funeral expenses."

By a codicil to her will the testatrix expresses herself thus: "If there is money

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"If there is money left unemployed I desire it may be given in charity," it was held that the words "money left unemployed" were sufficient to pass the residue of the personal estate, amounting to upwards of 2000*l.* Presuming that there is in the present case a gift to charity, there being no discretion vested in individuals, and no specific

left unemployed I desire it may be given in charity."

Held that the general residue of the testatrix's personal estate, including a sum of 2500*l.* trust monies, in which she had a vested reversionary interest, at the time of her death, subject to be divested by the appointment of her mother, passed under the words "money left unemployed," and was well given to charity.

the present Sir *Charles Asgill*, *Caroline* who intermarried with *Richard Legge*, *Amelia* who intermarried with *Robert Colvile*, and *Harriott Maria Asgill*, and in the year 1788 the said Sir *Charles Asgill* died, having by his will appointed the said Lady *Asgill* to be his executrix, and leaving her and his said four children him surviving.

The said *Harriott Maria Asgill* made her will, dated the 25th of *December* 1788, whereby, after appointing the said *Amelia Colvile* to be her executrix, and dividing a sum of 200*l.* long annuities to which she was entitled amongst several persons in specific legacies, she proceeded in the following words; "I give *Amelia Colvile* 2935*l.*, lent to her husband *Robert Colvile*, 100*l.* of which I desire her to give back to the person that lent it to me and who she knows; I give it to her for her sole and separate use, desiring at her decease she will leave it to whom she thinks best. I believe there will be sufficient money left to pay my funeral expenses, which I desire may be performed in the plainest and most unexpensive manner. I hope there will be no objections made to any mistake I may have made, but that it will be executed as seems to be my intention, as it is my true will and testament, written all in my own hand and signed by me *Harriott Maria Asgill.*

The said testatrix afterwards made a codicil to her said will, which was in the following words; If there is money left unemployed I desire it may be given in charity; my watch and piano forte I give to *Caroline*, the most useful of my clothes to be given to my present servant; I leave the key of my red trunk, which *Caroline* knows, to her *Caroline*; the contents she knows, and I give it to her as promised for her use, desiring her to keep it locked. *Harriott Maria Asgill.*

The said testatrix *Harriott Maria Asgill* afterwards died, leaving the said Lady *Asgill*, Sir *Charles Asgill*, *Amelia Colvile*, and *Caroline Legge*, her next of kin; and the will and codicil of the said testatrix were afterwards duly proved by the said *Amelia Colvile*.

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objects pointed out, the right of distribution falls to the Crown. *Moggridge* v. *Thackwell.* (*a*)

The *Master* of the *Rolls*, after observing that it was impossible to suppose the testator could have been ignorant of the nature and amount of the property he had

Lady *Asgill* survived the testatrix, but died in the year 1816, and by her will appointed the said Sir *Charles Asgill* and *Amelia Colville* to be her executors. The power of appointment contained in the settlement was not exercised either by Sir *Charles* or Lady *Asgill*.

The bill, which was filed by the said *Richard Legge* and *Caroline* his wife, against the said Sir *Charles Asgill* and *Amelia Colvile*, and against the *Attorney-General*, after alleging (as was admitted to be the fact by the answers) that the residue of the personal estate of the testatrix *Harriott Maria Asgill* consisted of the one-fourth part of the said sum of 10,000*l.* trust monies, to which she was entitled under the settlement, and of some other effects which were of very trifling value, insisted, that the said residue, upon the death of the testatrix became divisible amongst the next of kin, not having been disposed of by her will; but stated, that the same was claimed by the *Attorney-General*, as having been given by the will and codicil of the testatrix to charitable purposes.

By the decree made upon the hearing of the cause before the *Vice-Chancellor*, on the 27th of *February* 1818, the usual accounts were directed of the personal estate of the testatrix *Harriott Maria Asgill*, and it was declared, that the clear residue of such personal estate ought to be disposed of in charity.

The plaintiffs having appealed from the decree of the *Vice-Chancellor*, the question for the consideration of the Court upon the argument of the appeal was, whether the general residue of the testatrix's personal estate, and as part thereof the one-fourth part of the said sum of 10,000*l.* which at the time of the death of the testatrix was vested in her under the aforesaid settlement, subject to be divested by the appointment of her mother, must be held to have passed under the words "money left unemployed."

Mr. *Trower* and Mr. *Joseph Martin* for the plaintiffs.

Mr. *Hart* for the defendants in the same interest.

(*a*) 7 Ves. Jun. 36.

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to dispose of, and that it was evident, not only from the first sentence, in which a blank was left for the date, but from other parts of the will, that the testator considered it as an imperfect instrument, proceeded to comment upon the will, and remarked, that the expression, "I request my cousin and my friend to be my executors," was easily

The *Attorney-General* for the Crown.

The LORD CHANCELLOR.

I am obliged to attribute to this testatrix an intention which I am sure she never entertained; the law compels me to put such a construction upon this will as will have the effect of giving this fund to charity. This testatrix I am bound to suppose knew what her property was, and I must take her therefore to have known that she had a vested interest in 2500*l.* trust monies, subject to be divested by the appointment of her mother. Having by her will first disposed of certain long annuities, to which she was entitled, in specific legacies, she uses the following words; "I believe there will be sufficient money left to pay my funeral expenses." It is obvious she meant to apply the word *money* to every thing which was not included in what was before given. It is clear that she had other property besides that which she had specifically disposed of not in monies numbered; several articles are mentioned in the codicil which could not fall under the word *money* in its ordinary sense; it would be extremely difficult for a judge to say, that those other articles, not being money, were not to answer the funeral expenses, so as to give the specific legatees that benefit which they are by law entitled to, namely, to have their legacies paid to them without abatement. If the testatrix meant in this clause of her will to include any part of her property which did not fall under the word *money*, can it be said that she did not mean to include her interest under the settlement? The nature of the property makes it more probable that she did mean to include it. In the codicil the testatrix expresses herself thus, "If there is money left unemployed I desire it may be given in charity." In the ordinary sense of the words she might be said to contemplate a handful of casual money: but that is not a construction I can put, consistently with the construction which I am compelled to put upon the words of the will. The case which has been cited from *Ambler* (*a*) applies in some sense to this. There *Lord Camden* decided that the

(*a*) *Attorney-General* v. *Johnstone*, Amb. 577.

understood, if it was meant that they should undertake a troublesome duty, but was not likely to have been made use of, if the testator intended to constitute them his residuary legatees; and that although in the early parts of the will the executors were not the objects of equal favour; yet that equal legacies were given to them wherever they were taken up together as executors. His Honour then proceeded in the following manner;

The first question to be considered is, whether the executors are entitled to the general residue of the testator's estate. Let us suppose that the last clause of this will, upon which the material questions have arisen, had been altogether omitted; to whom would the testator's undisposed of property have gone; can there be a doubt that the executors would have been trustees for the next of kin. There never has been a case in which executors have been permitted to take the residue for their own use and benefit, when equal legacies have been given to them, and given to them as executors. Their having equal legacies marks them as being intended to discharge laborious duties, and not to take for their own use and benefit what may be left as residue. If the last clause of this will had been omitted, I am clearly of opinion that the executors would have been trustees for the next of kin; then the question is, whether, as to this point, the last clause makes any differ-

residue did not under the particular circumstances take in lapsed legacies; he made that decision because he did not consider the legatee as a general residuary legatee, and the question therefore was, what was the meaning of the words of the gift. In this case the question is, whether under the words *money left unemployed* the testatrix meant to pass the general residue of her estate and effects; the words *money left* in the first passage clearly mean every thing which is left after the prior gifts,—and how can I restrain the meaning of the same words in the codicil? Upon the whole therefore I am afraid that this sum is well given to charity.

Decree affirmed.

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ence; whatever construction may be put upon that clause, whether it embraces the whole, or only a small portion of the residue, there is nothing in it which at all alters the character or situation of the executors, or gives any interest to them. Their claim therefore to have the residue for their own use and benefit cannot be sustained, and the question rests entirely between the next of kin and the Crown.

Where there is a general indefinite charitable purpose, not fixing itself upon any particular object, the disposition is in the king by the sign manual, but when the gift is to trustees, with general or some objects pointed out, the Court will take upon itself the execution of the trust.

A trust to be carried into execution by the Court, must be of such a nature that it can be under the control of the Court.

If a testator means to create a trust, and the trust be ineffectually created, or fails, the next of kin take.

The law upon cases of this sort is now reduced to very clear and distinct principles. Where there is a general indefinite charitable purpose, not fixing itself upon any particular object, the disposition is in the king by the sign manual; but where the gift is to trustees, with general or some objects pointed out, the Court will take upon itself the execution of the trust. (*a*) Then what is the nature of this case;—is it a case in which the objects are pointed out? is it a case in which a discretionary power is vested in selected individuals to execute a purpose expressed by the testator? Can the trust be discovered from the expression "I desire it may be given in private charity?" because a trust, to be carried into execution by the Court, must be of such a nature that it can be under the controul of the Court; (*b*) if the trust cannot be ascertained, the Court cannot see to the execution of it; it becomes too general and indefinite, and the consequence is, that the fund must either go as an absolute gift to the individual selected to distribute it, or that individual must be a trustee for the next of kin; if the testator meant to create a trust, and the trust is not effectually created, or fails, the next of kin must take; and on the other hand if the party selected to make the distribution is to take, it must be upon the ground, that the testator did not intend to create a trust, but to leave it entirely to the discretion

(*a*) *Moggridge* v. *Thackwell*, 7 Ves. 36.

(*b*) *Morice* v. *The Bishop of Durham*, 10 Ves. 439.

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of the party to apply the fund or not. The points to be considered in these cases are, whether the object is definite, whether the person is described by whom the distribution is to be made, and whether that individual is, as in *Moggridge* v. *Thackwell*, a mere instrument to carry into execution the objects stated, or is to take the fund for his own benefit. If he is not to take for his own benefit, the consequence is, that if a particular object, as the erection of a school, or even a general object, provided it can be seen what the purpose is, is pointed out, the Court will execute the trust, although that object may fail, because then it has something to act upon: but if there is an absence of discretion in individuals, and the object to which the fund is to be applied is of a general indefinite nature, the law casts the application of the fund upon the king as *parens patriæ*.

If a particular object, as the erection of a school, or even a general object, provided it can be seen what the purpose is, is pointed out, the Court will execute the trust, although the object pointed out may fail.

It is material upon this subject to consider, that in those cases where there is no direct charity pointed out, there may be a legal purpose of trust created to be carried into execution, not a superstitious use, not an illegal use. It is competent to a testator to direct his executors to give to his poor relations; that is not charity, but it is a trust to give to poor relations. So with respect to provisions for the distribution of books; if the object is not illegal, why is not the Court to see that the intention is carried into execution; all those cases, not being cases of charity, in which the Court has interfered, only prove that the Court will execute a trust which is not illegal.

Cases in which the Court has interfered upon the ground of trust, distinguished from those in which a direct charity has been pointed out.

The cases which most nearly resemble the present are those in which there is a general description, such as in *Morice* v. *The Bishop of Durham*; the bequest there was in trust for such objects of benevolence and liberality as the Bishop of *Durham* in his own discretion should most approve; an individual was there designated trustee; the question was, not whether the trust was illegal, but

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whether it was sufficiently definite for the Court to execute. Liberality and benevolence include charity, but they are not convertible terms. The case therefore not ranking under those which belong to charity, the question came to be considered, whether the purpose was sufficiently definite for the Court to execute. The Court held that it was not. The fund therefore belonged to the next of kin. It did not belong to the Crown because it was not charity, it did not belong to the Court because it was not sufficiently definite for the Court to execute, and a trust having been created it devolved to the next of kin. That was the principle laid down in *Morice* v. *The Bishop of Durham*. In all cases falling within that principle, where there is a generality which the Court cannot execute, and a trust imposed upon the individual who is selected to distribute, the trust fails, and the fund is held by the trustee for those persons to whom the law has given personal property which is not disposed of.

Two questions arise upon the last clause of the will of this testator; First, what is meant to be included in it; Secondly, In what manner is the property included to be disposed of. The language of the clause in question is such as applies to a small sum only, small in regard to the property of the individual. It is spoken of as contingent, a circumstance, which if any other meaning can be put upon the clause, excludes the idea that the testator had in contemplation the general parts of his property of which he had made no disposition. Again the words of the will are, if there be any *money* remaining. *Hotham* v. *Sutton* has established that *money* does not by the force of the word include *stock*. If then reason and the nature of the context negative the probability that the testator was adverting to the stock,—why is the Court to put a construction upon the word *money* which it does not naturally import? It is remarkable that up to a certain extent all the dispositions in this will are legacies of stock; the

testator therefore has distinguished where he meant stock to be the subject of his disposition, and the context shews that in the clause in question he was not adverting to the stock. To construe the word *money* to mean *stock* would be to alter the words of the will contrary to the context. I own there is difficulty in knowing what the testator meant, but in cases of this sort we must do our best to put the most natural construction upon the words. My opinion is, that the testator was adverting to that which he has directed to be converted into money, and that the clause in question does not comprehend the general residue, but must be considered as applying to the residue of the produce of those articles which the testator has directed to be sold, after providing for the payments which are ordered to be made. Supposing that to be the case, it remains to be considered whether the Crown is to distribute this sum, or whether it belongs to the next of kin. The amount is small, but the principle is considerable. It appears to me that this case falls within the principle of the cases cited in which there is no object sufficiently definite to give the Crown jurisdiction, or to enable the Court to execute the trust. There is no case in which private charity has been made the subject of disposal in the Crown, or been acted upon by this Court. The charities recognized by this Court are public in their nature, they are such as the Court can see to the execution of. In this case the difference is obvious; if a party is to execute the purpose of this testator he cannot give to public charities; the disposition must be confined to private charity. In what respect does private charity differ from benevolence? Assisting individuals in distress is private charity, but how can such a charity be executed by the Court or by the Crown. In all cases the general principle is, that the trust must be of such a tangible nature as that the Court can deal with it; when it is mixed up with general moral duty it is not the subject of the jurisdiction of a Court of Justice. Private charity is in its nature indefinite,—how can it be controlled, how can it be carried

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into execution. As a general purpose of charity the object of this testator cannot be carried into execution, as a trust it is not sufficiently specific or definite. The sum in question must therefore go to the next of kin. With respect to the case of *Legge* v. *Asgill*, the testatrix in that case in the body of her will says, "I believe there will be sufficient money left to pay my funeral expenses;" and in the codicil she uses the expression, "If there is money left unemployed I desire it may be given in charity." In the will, the word "money" must have referred to the general residue, because it was out of the general residue that the funeral expenses must be paid; and it could not be doubted but that the same word in the codicil must have reference to the same subject.

The decree declares, that the plaintiffs the executors are trustees for the next of kin, as well of the remainder of the money arising or to arise from the sale of the specific articles and things directed to be sold by the will of the said testator *Buckeridge Ball Ackworth*, as of the general residue of the testator's personal estate.

BETWEEN WILLIAM MOUNTFORD - - PLAINTIFF.

AND

ROBERT SCOTT, JAMES BLAKE, AND CHARLES WARNER - - - - - - - - - DEFENDANTS.

July 23.

Where deeds are deposited for the purpose of obtaining credit, the person with whom they are deposited has no lien upon them for what is due to him in respect of monies previously advanced.

BY indenture of lease, dated the 3rd of *March* 1809, a piece of ground was demised by *William Stapp* to the defendant *Robert Scott*, for the term of 78 years and a quarter from the 25th of *March* then instant at the yearly rent of 18*l*. 2*s*., and on the 18th of *April* 1809, the lease was placed by *Scott* in the hands of the plaintiff, to

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whom he was at that time indebted; at the time of the deposit of the lease one house had been erected upon the ground demised, and four others were afterwards built, and an underlease of those four houses was, by indenture dated the 16th of *February* 1810, granted by the defendant *Scott* to the defendant *Blake* for the term of 77 years and a half wanting 10 days from the 25th of *December* then last at a pepper corn rent. The underlease was expressed to be made in consideration of 200*l.* paid by *Blake* to *Scott*; but it was in fact made in part satisfaction of a debt due from *Scott* to *Blake* for timber and materials used in building the houses. It contained a covenant on the part of *Scott* to indemnify *Blake* against the rent of 18*l.* 2*s.* reserved by the original lease, and a power was given to *Blake* to enter and distrain upon the remainder of the premises comprised in such original lease in case he should be called upon to pay such rent, and *Scott* covenanted that in the event of there not being sufficient distress upon the premises he would assign over the original lease to *Blake*. The defendant *Blake* afterwards sold the four houses to the defendant *Warner* for 285*l.*, and assigned them to him by a deed-poll indorsed on the underlease, and dated the 28th of *March* 1810. The underlease and the deed-poll were prepared by the same solicitor.

The bill stated the foregoing facts, and alleged, that the original lease was deposited with the plaintiff as a security for the debt then due to him, and that the defendant *Blake*, at the time of the underlease being granted, and the defendant *Warner*, at the time of the assignment to him, respectively had notice of the deposit having been made for the above-mentioned purpose. The bill prayed, that an account might be taken of what was due to the plaintiff on the security of the lease of the 3rd of *March* 1809, and that the defendants might be decreed to pay to the plaintiff what upon taking such account should appear to be due to him, or in default of payment, that the de-

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fendants might be decreed to assign and convey to the plaintiff all their estate and interest in the lease deposited with the plaintiff, and also in the lease of *Feb.* 1810, and that such of the defendants as should appear to have the lease of *Feb.* 1810, and the deed-poll indorsed thereon, in their possession or power, might be decresd to deliver up the same to the plaintiff; and if it should appear that *Warner* had not, before the execution of the assignment to him, and the payment of the purchase money for the same, any notice or reason to believe that the lease of the 3rd *March* 1809 had been deposited with the plaintiff, then that the defendants *Scott* and *Blake*, or one of them, might be decreed to pay to the plaintiff, what should appear to be due to him for principal and interest, on the security of the said lease.

By the joint several answer of the defendants *Scott* and *Blake*, the defendant *Blake* admitted, that before the underlease was granted to him, he had been informed of the original lease having been deposited with the plaintiff as a security for a sum of money due to him from the defendant *Scott*, but insisted, that such lease, so deposited, could be considered only as affecting the one house which was erected on the piece of ground in question at the time of the deposit of such lease with the plaintiff, if the deposit could be considered as having effect at all.

The defendant *Warner*, in a passage of his answer which was read as evidence, admitted, that *Gyles*, the solicitor who prepared the underlease, was his solicitor at the date of the assignment to him, and was employed by him to prepare, and did prepare the deed-poll of the 28th of *March* 1810, and perused and approved of the same on his behalf, and as his solicitor, but he denied, that at the time of the execution of the deed-poll, or of paying his purchase money for the underlease, he had any notice of the original lease having been deposited with

the plaintiff for the purpose of securing the payment of any sum of money, or for any other purpose.

Gyles, the solicitor who prepared the underlease and assignment, was examined both on the part of the plaintiff, and of the defendants, and deposed, that upon the occasion of his being instructed to prepare the underlease, he asked the defendant *Scott* for the original lease, and that the defendant *Scott* informed him, that he had left it in the hands of the plaintiff for the purpose of obtaining credit thereon, and that the plaintiff, after it had been so left with him, had viewed the premises thereby demised, and had declared, that the messuage erected thereon was not, in the shape of security, worth one shilling, the same being subject to a yearly ground rent of 18*l.* 2*s.*, and that he would not give him the defendant *Scott* any credit whatever upon the said lease, or the premises thereby demised. *Gyles* further deposed, that the defendant *Scott* at the same time declared to him, that he never had any timber or other goods or articles whatever from the plaintiff, by way of credit or otherwise, after he had left the said lease with him, and that he had not at any time given or executed any instrument to the plaintiff for any debt due or owing by him to the plaintiff, whereby the said lease was declared or understood to be deposited with the plaintiff as or by way of security, and that he had not ever given any security whatever to the plaintiff for the debt due from him, save and except a promissory note or bill of exchange for the sum of 130*l.*, or thereabout, for goods sold and delivered some time previous to the time of his leaving the lease with the plaintiff, and that the occasion of his having left the said lease with the plaintiff was, in consequence of his having sometime after he had given the aforesaid promissory note or bill of exchange applied to the plaintiff for some timber on credit to carry on and complete some buildings, and the plaintiff having requested to know whether he would

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deposit any lease or deed as a security for such further credit. *Gyles* further deposed, that he prepared the underlease of the 16th of *February* 1810 as the solicitor of the defendants *Scott* and *Blake*, and that he was before, and at the time of the date or execution of the said indenture of underlease, informed by the defendant *Scott*, that the original lease was then deposited with the plaintiff. The defendant *Scott* was also examined by the plaintiff.

After several witnesses had been examined, the defendant *Blake* became bankrupt, and the defendant *Scott* took the benefit of the insolvent debtor's act, and a supplemental bill was filed against their assignees.

The cause was heard before the *Vice-Chancellor* on the 24th of *January* 1818, and his Honour ordered the bill to be dismissed (*a*)

The plaintiff appealed from the decree of the *Vice-Chancellor*, and the appeal now came on.

In the course of the argument an objection was made by the defendants to the evidence of *Scott* being read for the plaintiffs, upon the ground that a decree was prayed against him. In answer to the objection it was argued, that *Scott* having taken the benefit of the insolvent debtor's act, his provisional assignee would alone be liable.

The *Lord Chancellor* observed, that in the lease to *Blake*, *Scott* covenanted, in the event of there not being a sufficient distress upon the premises, to assign over the original lease; that *Warner* as the assignee of *Blake* would be entitled to the benefit of that covenant; and that *Scott* therefore was interested, because there might be a demand upon the covenant, on which he might be

(*a*) 3 Madd. Rep. 34.

sued, and to which, if he was sued, (the demand being after the proceedings under the insolvent debtor's act) both his person and estate would be liable.

Mr. *Agar* and Mr. *Parker* for the appellant.

It is quite clear that the equitable title of the plaintiff must prevail against the legal estate of the defendant, if he is affected with notice; *Hiern* v. *Mill.* (*a*) The possession of the original lease by the plaintiff was sufficient to put the defendant upon enquiry, and therefore to affect him with notice. *Smith* v. *Low.* (*b*) Where a purchaser cannot make out his title except through a deed which leads to a fact, he is to be considered as having knowledge of that fact. *Mertins* v. *Jolliffe.* (*c*) It has been often decided that notice to an agent is notice to the principal. *Maddox* v. *Maddox,* (*d*) *Le Neve* v. *Le Neve,* (*e*) *Sheldon* v. *Cox.* (*f*) In this case *Gyles* had notice of the deposit with the plaintiff, and it is admitted that he was the solicitor of *Warner.*

Mr. *Hart* and Mr. *Willis* for the defendants.

The LORD CHANCELLOR.

I am clearly of opinion that there is in this case no ground for determining that the plaintiff is entitled to relief. It is true that it is established that a deposit of deeds is to be taken as a fact of evidence that the deposit is made for the purpose of securing money; that was laid down by Lord *Thurlow,* upon the notion that the deposit could be made for no other purpose; but the whole tenor of all the cases is, that that doctrine is not to be carried further. The *Vice-Chancellor* in this case appears to have proceeded

(*a*) 13 Ves. 114.
(*b*) 1 Atk. 489.
(*c*) Ambler 311.
(*d*) 1 Ves. Sen. 61.
(*e*) Ambl. 436.
(*f*) Ambl. 624.

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upon the notion, that notice to a man in one transaction is not to be taken as notice to him in another transaction; in that view of the case it might fall to be considered, whether one transaction might not follow so close upon the other, as to render it impossible to give a man credit for having forgotten it. I should be unwilling to go so far as to say, that if an attorney has notice of a transaction in the morning, he shall be held in a Court of Equity to have forgotten it in the evening; it must in all cases depend upon the circumstances. Supposing that when *Warner* took this assignment, he was affected with notice of what was known to *Gyles* in the transaction with *Blake*, it is a clear fact in proof in this cause that the lease was not deposited for money advanced at the time; if it was put into the hands of the plaintiff as a security at all, it must have been for an antecedent debt; but the account which *Gyles* gives of the transaction is, that the lease was carried to the plaintiff, not for the purpose of being applied as a security for money already advanced, but for the purpose of obtaining future credit; I apprehend it has never been held, that if deeds are carried to a man for the purpose of obtaining credit from him, he has a lien upon them for what is due to him in respect of monies theretofore advanced. Such a decision would carry the doctrine upon mortgages by deposit of deeds, further than it has ever yet been carried. This decree therefore must be affirmed.

Whether notice to an attorney in one transaction shall be notice to him in another transaction must in all cases depend upon the circumstances.

Decree affirmed.

REPORTS

OF

CASES

ARGUED AND DETERMINED

IN THE

HIGH COURT OF CHANCERY.

COMMENCING IN THE

SITTINGS BEFORE MICHAELMAS TERM,

3 Geo. IV. 1822.

BETWEEN ROBERT JOHNSON and Others, on behalf of themselves and all other the Creditors of Sir JOHN LEGARD, deceased . . .

PLAINTIFFS;

AND

Sir THOMAS LEGARD, Bart., THOMAS DIGBY LEGARD, an Infant, the eldest Son of the said Sir THOMAS LEGARD, HENRY WILLOUGHBY, DIGBY LEGARD, and RICHARD WATT, . . .

DEFENDANTS.

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July 10, 12, 21, 23.

The creditors of a vendor cannot insist that an

BY the settlement made upon the marriage of Sir *Digby Legard* with *June Cartwright*, in the year

estate contracted to be sold has been converted into personal assets, unless the title be such, that the court will compel a purchaser to take it.

The author of a voluntary settlement cannot file a bill for the specific performance of a contract afterwards entered into by him to sell the settled estate.

Whether his creditors after his death can maintain such a bill. Quære.

The court was of opinion, that limitations in a marriage settlement to the brothers of the settlor and their issue were voluntary; but thought, under the circumstances, that a purchaser could not be compelled to take the title depending on the validity of those limitations, and dismissed a bill by the creditors of the vendor after his death for specific performance, there having been subsequent dealings with the estate which might have confirmed the settlement, the agreement for purchase being suspicious, and it being doubtful whether the creditors could file such a bill.

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1755, several estates, and amongst others an estate at *Etton* in the county of *York*, were conveyed by Sir *Digby Legard*, to the use of himself for life; remainder to the intent that *Jane Cartwright*, if she survived him, might during her life receive an annuity of 500*l.* for her jointure; remainder to trustees for the term of two hundred years, to secure the annuity; remainder to other trustees for the term of five hundred years, in trust to raise the sum of 6,000*l.* for the portions of the younger children of the marriage; remainder to the first and other sons of the marriage successively in tail male; with divers remainders over.

There was issue of the marriage between the said Sir *Digby Legard* and *Jane Cartwright*, *John*, afterwards Sir *John Legard*, *Thomas*, afterwards Sir *Thomas Legard*, one of the defendants, the defendant *Digby Legard*, and several other sons and daughters. Sir *Digby Legard* died in 1773; and in the month of *May*, 1782, Sir *John Legard* suffered a recovery of the settled estates, and declared the uses to himself in fee.

By indentures of lease and release, dated the 14th and 15th of *June*, 1782, made previous to and in contemplation of a marriage, then intended and afterwards solemnized, between the said Sir *John Legard* and *Catherine Lapel Aston*, the release being made between the said Sir *John Legard* of the first part, *Henry Aston* and *Catherine Lapel Aston* of the second part, *Thomas Grimston* and *Edward Dicconson* of the third part, *Thomas Eccleston* and *Edward Standish* of the fourth part, and *Henry Harvey Aston* and *Anthony Hodges* of the fifth part, after reciting that the sum of 4,000*l.* was to be received by the said Sir *John Legard* as the portion of the said *Catherine Lapel Aston*, the said Sir *John Legard*, in consideration of the intended marriage, and of such portion as aforesaid, and for making a provision for the

said *Catherine Lapel Aston* and the issue of the marriage, and for settling the estates thereinafter mentioned to the uses thereby declared, conveyed the estates which had been comprised in Sir *Digby*'s marriage settlement, subject to the jointure and to the terms of two hundred years and five hundred years thereby created, to the use of himself for life, remainder to trustees during his life to preserve contingent remainders, remainder to the intent that the said *Catherine Lapel Aston* should during her life receive thereout an annuity of 300*l.* for her jointure, remainder to trustees for the term of one hundred years to secure the annuity, remainder to trustees for the term of five hundred years for raising portions for the younger children of the marriage, remainder to the use of the first and other sons of the marriage successively in tail male, remainder to the use of the first and other sons of Sir *John Legard* by any future wife successively in tail male, remainder to the use of the defendant Sir *Thomas Legard* for life, remainder to the use of the first and other sons of the said defendant Sir *Thomas Legard* successively in tail male, with similar limitations in remainder to the defendant *Digby Legard* and the other brothers of Sir *John Legard* for their lives successively, and to their first and other sons successively in tail male, with remainder to Sir *John Legard* in fee.

In the year 1805 an act of parliament was passed, on the petition of Sir *John* and Lady *Catherine Legard*, by which, after reciting that the sum of 6,000*l.* raiseable under the trusts of Sir *Digby*'s marriage settlement had been raised by mortgage of the settled estates, and that those estates had been further mortgaged for the purpose of securing several sums of money which Sir *John Legard* had charged thereon under the powers of several inclosure-acts, and that the inclosures not being yet completed further sums of money would be wanted for that purpose; and also reciting that by an indenture, dated

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the 21st of *March*, 1805, Lady *Jane Legard* had released the estate at *Etton* from her jointure, being satisfied that the residue of the estates subject thereto were an ample security for the same; several detached parts of the settled estates, including a part of the estate at *Etton*, were discharged from the uses limited by Sir *John Legard's* marriage settlement, and vested in trustees, upon trust to sell, and after applying the purchase monies in paying off the above-mentioned incumbrances on the settled estates, and reimbursing Sir *John Legard* the expenses of the inclosures not then completed, to the extent to which by virtue of the inclosure-acts he was empowered to charge such expenses upon the settled estates, to lay out the surplus in the purchase of other estates to be limited to the uses of the settled estates.

In *October*, 1807, Sir *John Legard* entered into a contract to sell the *Etton* estate to the defendant *Richard Watt* for 15,500*l.*; the agreement for sale recited, that Sir *John Legard* was seised in fee of the estate, subject to the term of five hundred years for raising portions for his younger children, and also subject to a limitation to his first and other sons by *Catherine* his wife successively in tail, but discharged of all other incumbrances; and it provided, that Sir *John Legard* or his heirs should, on or before the 6th of *April*, 1808, convey the estate to *Watt*, discharged of the term of five hundred years and the trusts thereof, and indemnified from the said limitation to his issue male. The agreement further provided, that upon the conveyance being made, the purchase money with interest should be secured by a mortgage of the estate and by the bond of *Watt*; and that it should remain upon that security during the life of Sir *John Legard*, and for twelve months after his decease, if the interest was regularly paid, and should not in any case be called in before the expiration of three years. It was also stipulated by the agreement, that if *Watt*, his heirs or

assigns, should be evicted from or deprived of the possession of the premises by any issue male of Sir *John Legard*, or by any other person claiming or deriving title through or under him, any sums of money laid out by *Watt* or his heirs in improvements or necessary alterations on the premises, with lawful interest for the same from the time such sums were advanced, and also so much of the purchase money as might have been paid, should be repaid by Sir *John Legard*, his heirs, executors, or administrators; and the security for the purchase money remaining unpaid was on the same event to cease and be void.

Sir *John Legard* died without issue in the month of *July*, 1808, leaving the defendant Sir *Thomas Legard* his heir at law, and having by his will appointed the defendant *Digby Legard* to be his executor. At the time of his death the contract for the sale of the *Etton* estate had not been carried into effect, though he had instituted a suit for specific performance which was then pending. Previous to the death of Sir *John Legard* a commission of lunacy had issued against Sir *Thomas Legard*, and the defendant *Henry Willoughby* was the committee of his estate.

The bill, which was filed by creditors of Sir *John Legard* whose debts were contracted subsequently to the date of his marriage settlement, charged, that the limitations contained in that settlement, subsequent to the limitations therein contained to the first and other sons of Sir *John Legard* by any future wife, were fraudulent and void; and that no consideration had at any time been given, by or on the behalf of any of the objects of the said limitations, in respect of the estates limited to them respectively. The bill further charged, that the defendant *Digby Legard* refused to take the necessary steps for the purpose of enforcing the contract, and alleging that the

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personal estate of Sir *John Legard*, exclusive of the purchase money, was insufficient for the payment of his debts, it prayed, that it might be declared by the Court that the limitations in remainder contained in the indenture of release of the 15th of *June*, 1782, subsequent to the limitations therein contained to the first and other sons of Sir *John Legard* by any wife he should afterwards marry in tail male, were, so far as respected the premises contracted to be sold to *Watt*, fraudulent and void; and that the agreement of *October*, 1807, might be specifically performed, and a proper conveyance executed to *Watt* of the premises therein comprized; and that *Watt* might be directed to pay the purchase money for which the premises were contracted to be sold to the defendant *Digby Legard*, as part of the personal assets of Sir *John Legard*; and that the same when received might be applied in a proper course of administration, and the debts due to the plaintiffs and the other creditors of Sir *John Legard* paid thereout.

The defendants Sir *Thomas Legard* and *Thomas Digby Legard* by their answers insisted, that the limitations contained in the marriage settlement of Sir *John Legard* sought to be impeached by the bill were good and valid; and that the consideration appearing upon the settlement, and the natural love and affection of Sir *John Legard* for his brothers, were sufficient to support the uses. They also insisted, that the act of parliament confirmed the settlement, and that if the settlement could be considered as voluntary, neither Sir *John Legard*, nor any persons claiming under him, could call upon them to join in a conveyance of the premises.

The defendant *Watt* by his answer objected to the title on account of the settlement, but submitted to perform the agreement on having a good title.

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The cause was heard at the Rolls on the 17th of *December*, 1813; and it being then considered necessary to obtain the opinion of a court of law upon the validity of the limitations in the settlement to the brothers of the settlor and their issue, a case was by the decree directed to be made for the opinion of the court of King's Bench upon that point. A case was accordingly prepared in pursuance of the decree, stating the settlement, and that the estate had been conveyed to *Watt* for a valuable consideration: but the conveyance was not stated to have been such as would have been made if the terms of the agreement had been strictly pursued, and no notice was taken of the act of parliament. The Judges of the court of King's Bench having certified, upon the case before them, that none of the limitations to the brothers of the settlor or their issue were valid against the defendant *Watt*, (*a*) the cause was heard, upon further directions, before his honour the *Vice-Chancellor* on the 18th of *July*, 1818; (*b*) and a decree was made, by which it was declared, that the limitations in remainder contained in the indenture of the 15th of *June*, 1782, subsequent to the limitations therein contained to the first and other sons of Sir *John Legard* by any wife he should afterwards marry in tail male, were, so far as they respected the premises contracted to be sold to the defendant *Watt*, fraudulent and void as against that defendant; and it was referred to the Master to enquire, whether a good title could be made to the premises in question.

The defendants Sir *Thomas Legard* and *Thomas Digby Legard* having presented a petition of appeal, both from the original decree, and the decree on further directions, the cause now came on to be heard upon appeal.

The *Attorney-General*, Mr. *Shadwell*, and Mr. *Hayter*, for the plaintiffs.

(*a*) 6 Mau. & Selw. 60. (*b*) 3 Madd. 283.

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The limitations in the settlement to the brothers of the settlor and their issue are voluntary, and void against a purchaser for valuable consideration under the statute of *Elizabeth*. (*a*) In all the cases in which limitations to collateral relations in a marriage settlement have been sustained, there has been some consideration independent of the marriage and the portion of the wife. In *Jenkins* v. *Keymis*, (*b*) where it is stated to have been the opinion of *Hale* that the consideration of marriage and portion extended to all the estates in the settlement, the father of the settlor was tenant for life, and the settlement could not have been made without his concurrence; and the opinion expressed by *Hale* must have referred to the circumstances of the case, for in *Roscarrick* v. *Barton* (*c*) he appears to have considered a limitation to a brother in a marriage settlement to be voluntary. In *Osgood* v. *Strode*, (*d*) where the Court decreed the specific performance of marriage articles at the instance of a nephew of the settlor, the grandfather was considered to have become a purchaser by giving up an equitable interest in the estate. In *Stephens* v. *Trueman*, (*e*) *Ithell* v. *Beane*, (*f*) and *Roe* v. *Mitton*, (*g*) limitations, which would otherwise have been deemed voluntary, were supported upon similar principles: but it is clear that the marriage consideration alone will not support remainders to collateral relations. Lane 22. *Staplehill* v. *Bully*, (*h*) *Sutton* v. *Chetwynd*. (*i*) In addition to those authorities, the decision of the Court of King's Bench in the present case is decisive upon that point. The case of *Clayton* v. *Earl Winton* (*k*) has not infringed upon the law, as the limitations to the issue of the second marriage were in that case interposed between the limitations to the sons, and those to the daughters, of the first marriage. *White* v.

(*a*) 27 Eliz. c. 4.
(*b*) 1 Lev. 150.
(*c*) 1 Ch. Cas. 217.
(*d*) 2 P. Wms. 245.
(*e*) 1 Ves. 73.
(*f*) 1 Ves. 215.
(*g*) 2 Wils. 356.
(*h*) Prec. Chan. 224.
(*i*) 3 Meriv. 249.
(*k*) 3 Madd. 302.

Stringer,(*a*) which has been relied on as an authority in support of the limitations in this case, proceeded upon the principle, that the purchaser, by taking a collateral security, had acknowledged the limitations to be good, and could not afterwards take advantage of the statute. It is clearly settled, that a voluntary settlement is void against a purchaser for valuable consideration, though he has notice of it. *Doe* v. *Manning*.(*b*) Assuming the limitations to be voluntary, the next question is, whether *Watt*, having entered into a contract to buy the estate, but not having obtained a conveyance, is a purchaser within the meaning of the statute? The intention of the statute was, that wherever an estate was created for a valuable consideration, the voluntary settlement should be defeated. A Court of equity considers that which is contracted to be done for a valuable consideration as actually done; and from the time of the contract therefore the purchaser is in equity the owner of the estate, and the voluntary settlement is void against him. In *Metcalfe* v. *Pulvertoft*,(*c*) a receiver was appointed before answer, at the instance of a purchaser from the settlor; and in several other cases agreements to purchase, entered into with the settlor, have been carried into effect against those claiming under the settlement. *Leach* v. *Dean*. (*d*) *Douglasse* v. *Waad*. (*e*) *Parry* v. *Carwarden*.(*f*) *Buckle* v. *Mitchell*.(*g*) The remaining question is, whether the creditors have not a right to compel the performance of the contract. At the death of Sir *John Legard* the estate was in equity converted into personalty; and the executor having an adverse interest, the creditors may file a bill to obtain the benefit of that conversion. In *Smith* v. *Garland*,(*h*) Sir *William Grant* decided, that the Court would not

(*a*) 2 Lev. 105.
(*b*) 9 East. 59.
(*c*) 1 Ves. & Beam. 180.
(*d*) Rep. in Chan. 78.
(*e*) 1 Ch. Cas. 99.
(*f*) 2 Dick. 544.
(*g*) 18 Ves. 100.
(*h*) 2 Meriv. 123.

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assist a vendor in defeating a prior voluntary settlement made by himself: there is great inconvenience in that decision, as it has the effect of rendering the contract binding on the vendor and not on the purchaser. This case is distinguishable from *Smith* v. *Garland*:—there the bill was filed by the vendor against an unwilling purchaser, who repudiated the benefit of the statute;—this is a suit by creditors, claiming adversely to the vendor, against a willing purchaser. The creditors have a better equity than the vendor: they may have forborne to demand payment of their debts upon the faith of this contract. In many cases the creditors of a party have a superior equity to that of the party himself. When a power is executed in a defective manner, the party executing the power cannot have the assistance of the Court to remedy the defect, but his creditors may file a bill for that purpose.

Mr. *Horne*, Mr. *Sugden*, and Mr. *Lynch*, for the defendants claiming under the settlement.

It is unnecessary to enter into the question of the validity of the settlement at law: but it is an obvious argument in favour of the remainders, that there being a title in the family, it was important to the wife, that those who succeeded to the title, in case the husband died without issue, should have power to support the dignity. The statute of *Elizabeth* does not apply to purchasers who do not claim under actual conveyances. The language of the statute, connecting purchasers with lessees and grantees, who must claim under a conveyance, shews that the persons intended to be protected were those to whom estates had been actually conveyed. How can the statute, which was intended to prevent frauds being practised upon purchasers, apply to the cases of persons, who have merely contracted for estates, and paid no part of the purchase-money?

voluntary settlement is affected by the statute
the date of the contract, its existence will depend
circumstances varying from day to day. At all
ts, there must be a *bona fide* contract to defeat
settlement: but the agreement in this case was a
trick on the part of Sir *John Legard*, to which
purchaser was a party. No part of the purchase-
ey was to be paid till twelve months after the death
ir *John Legard*; and if the purchaser was evicted
he remainder-men, the money was to be repaid;
purchaser therefore loses nothing if the voluntary
ement prevails. In this view of the subject, *White*
tringer decides the case. There is no case prior
uckle v. *Mitchell*, in which a purchaser, with notice
voluntary settlement, ever obtained a decree for
ific performance. In the previous cases nothing
aid about notice to the purchasers. In *Buckle* v.
chell it was not necessary to decide the general
ciple; the settlement contained a power to sell
the purpose of paying off mortgages existing on
estate, and the settlor had paid off a mortgage with
own money; the legal estate also was outstanding, so
the question was, which party had the better
ty? The authority of that case therefore does
extend beyond the opinion expressed by Sir *W.*
nt. This case falls within the distinction mentioned
Lord *Hardwicke*, in *Bennet* v. *Musgrove*,(*a*) and
ey v. *Lee*,(*b*) that in cases of presumed fraud a
haser for valuable consideration must be left to
remedy at law, and that this Court will only relieve
nst a voluntary conveyance in cases of actual fraud.
act of Parliament obtained by Sir *John Legard*
such a recognition of the settlement, as to make
ood by matter *ex post facto*. It is not competent

(*a*) 2 Ves. 51.

(*b*) 1 Atk. 625.

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to the creditors of the settlor to file this bill;—they can have no better equity than the settlor himself, by whom the bill could not have been sustained. *Burke* v. *Dawson.*(*a*) *Smith* v. *Garland.*

Mr. *Hart* and Mr. *Wetherell,* for the defendant *Watt.*

The *Attorney-General* in reply, as to the invalidity of the remainders to the collateral relations, relied upon the opinion of the Court of King's Bench, and upon the case of *Sutton* v. *Chetwynd;* and as to the application of the statute to a purchaser under a contract only, upon the cases cited in the opening. Admitting that a voluntary settlement might be made good by subsequent transactions, he contended, that the act of parliament in this case had no such effect;—that it was competent to Sir *John Legard,* as against the remainder-men, to have sold without the intervention of parliament, and that the act was passed only to enable him to sell as against his mother and his wife and issue;—that no consideration therefore moved from the remainder-men, and that it was not sufficient to make good their estates that the mother had relinquished her claim on a portion of the property; more particularly, as it appeared by the recitals of the act that there was an ample fund remaining to answer her jointure. With respect to the nature of the agreement he insisted, that there was nothing unreasonable on the part of the purchaser in taking care to protect himself against the acts of persons claiming under Sir *John Legard;* and that if the estate had been conveyed, the conveyance must have contained a covenant for that purpose; and as evidence of the *bona fides* of the transaction, he relied upon the circumstance of Sir *John Legard's* having

(*a*) Rolls, *March,* 1805. Sug. Vend. and Purch. 5th ed. 569.

filed a bill to enforce the contract. After citing the case of *Evelyn* v. *Templar*,(*a*) as establishing the proposition, that the remainder-men had no claim upon the money produced by the sale, he further argued, that there being at the death of Sir *John Legard* a binding contract between him and *Watt*, which had converted the real estate into personal, and the executor refusing to file a bill, the Court would enforce the contract at the instance of the creditors. *Lacon* v. *Mertins*.(*b*) *Buckmaster* v. *Harrop*.(*c*)

In the course of the argument, the *Lord Chancellor* said, that if there had been nothing more in the case than that the settlement was made upon the marriage, he thought that the remainders would have been held to be voluntary, and void against a subsequent purchaser; but that he could not make up his mind to say, that the act of parliament, and the conveyance by Lady *Jane Legard*, made no difference in the case.

At the close of the reply, his Lordship, after observing that that part of the estate which was affected by the act of parliament could only be sold by a contract with the trustees, delivered the following judgment.

It appears to me at present, that it is impossible to confirm these decrees. This is a bill brought by creditors of Sir *John Legard*, who made a settlement in the year 1782. The creditors by whom this bill is filed are persons whose debts were contracted subsequently to the date of the settlement; and if they can file any bill at all, it must be upon the principle, that Sir *John Legard*, having entered into a contract

(*a*) 2 B. C. C. 148.
(*b*) 3 Atk. 1.
(*c*) 7 Ves. 341. 11 Ves. 456.

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to sell this estate, has given them a right to say, that he converted the fee-simple of the premises into personal estate—that he divested himself of all title to those premises as land, and became entitled to consider himself as a creditor of Mr. *Watt* for 15,500*l.*; and that *Digby Legard* not choosing to enforce the contract, they have a right to do so. It is infinitely too late to comment on the original decisions on the statute of *Elizabeth*: but when one looks at the terms of the statute, one is certainly a little surprised to hear it said, that if a man upon his marriage thinks proper, after providing for his issue, to limit his property to his own brothers and sisters, that is so fraudulent a thing, that the party is to be considered guilty of a misdemeanor. It has been determined in this Court, that if a voluntary settlor enters into a contract to sell the estate, and files a bill to carry the contract into execution, the Court will not assist him. One difficulty in the way of assisting him is, that he has no equity to defeat the act which he has done himself: but another consideration which has weighed in such cases is, that if you compel a purchaser to take an estate at the instance of such a man, you cannot be quite sure that there may not have been some intermediate acts, which by matter *ex post facto* may have made the settlement good, which in its origin was not good.

A voluntary settlement may be made good by matter *ex post facto*.

It cannot be denied, with respect to persons who make voluntary settlements, and those who are called volunteers, that they may come to such future bargains as to make that which was originally voluntary no longer to be so considered. Then how does this case stand? After this settlement was made, Sir *John Legard* applied to Parliament to enable him to sell a portion of the settled estates, and Parliament granted the application. There can be no doubt that Parliament would not have done that without the consent of all the persons having a present interest in the estate;

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and without entering into the question what would be the effect of such a thing, how is it possible for me to proceed upon the opinion of the Court of King's Bench, when that Court had not the circumstance before it? The case sent to the Court of King's Bench ought to have stated the act of parliament; and, instead of stating a simple conveyance in fee to *Watt*, ought to have stated such a conveyance as would in all respects have carried into effect the agreement which was made. The result is, that the case must be gone all over again, and be considered as it was in 1813. But, independently of all the questions which have arisen in this case, and without giving any opinion upon any of them, without entering into the question, whether these creditors stand in a better situation than Sir *John Legard*, or in the same situation as that in which he stood, I apprehend this is quite clear, that unless this Court would compel *Watt* to take this title, the creditors cannot insist that this contract has converted into personal assets the estate contracted to be sold; and, attending to the modern doctrines of the Court, it does not appear to me, that I could compel a purchaser to take this title. If however you like to have the case sent to the Court of King's Bench again, stated in the way in which I think it ought to have been stated before, you may have it.

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The plaintiffs having declined taking the case, the *Lord Chancellor* said, then the decisions must be reversed: but I do not wish any thing which I do to involve a doubt as existing on my mind upon the opinion of the Court of King's Bench. Adverting to the nature of the agreement;—adverting to the act of parliament, and to the difficulty which there would be in making a title in any state of the case;—and adverting also to the question, whether the creditors have a right to institute this suit for the purpose of com-

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pelling the purchaser to take this property, if a good title could be made, when he could not have been compelled to take it, if the bill had been filed by the person with whom he contracted, I think this bill ought to be dismissed.

Bill dismissed.

April 29, 1824.

SUTTON *v.* CHETWYND.

THE LORD CHANCELLOR observed, that this case, which had been then heard upon appeal in the House of Lords, was reported, as if the question had been, Whether Sir *Richard Sutton* was within the consideration of marriage; and that the articles appeared to have been read in the Court below to the extent only of raising that question; but that the real question was, Whether certain individuals were not purchasers for the benefit of Sir *Richard Sutton*.

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JONES *v.* GARCIA DEL RIO.

July 5, 14, 24.

HIS was a bill filed by three persons, on behalf of themselves and all other the holders of scrip or es of the Peruvian loan, against *John Garcia del Rio* *Jumes Paroissien*, who were stated by the bill to come over from *South America* in the character of ys and ministers, from a government styling itself the vian government, to this country, and to have repre- ed themselves to be empowered to contract for a loan he use of the said government, and against *Thomas der* the younger, the contractor for the loan, and *liam Everett* and others, the bankers to whom the criptions for the loan were paid. The bill prayed, an account might be taken of the monies which had advanced and paid by the plaintiffs and the other ers of scrip or shares of the loan who should come in claim the benefit of the suit, and that the plaintiffs such other holders as aforesaid might be declared en- d to have what they had so paid returned to them, to have the monies paid to and remaining in the ls of the defendants the bankers applied for that pur- , and that an account of such monies might be taken, that the same might be applied accordingly, and that e meantime the defendants the bankers might be re- ned from parting with such monies, and the other ndants from receiving or disposing of the same.

Some of the holders of scrip or shares of a loan cannot file a bill on behalf of themselves and the other holders to have their subscriptions returned.

Several persons having distinct demands, and not being able to sue on behalf of themselves and others, cannot be co-plaintiffs.

The cases in which a bill can be filed by one person on behalf of himself and others, are cases in which the others have a choice between that and nothing.

appeared by the pleadings, that in *October* 1822 lefendant *Kinder* entered into a contract for a loan of ey to the defendants *Garcia del Rio* and *Paroissien* he service of the state of *Peru*, to be in part secured onds of the *Peruvian* government payable to bearer;

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that a great number of persons afterwards purchased from *Kinder* scrip or shares of the loan; that the scrip having been in many instances sold by the original holders, the plaintiffs severally became purchasers of portions of it; and that two instalments had been paid by the several holders of scrip, on account of the loan, into the hands of the defendants the bankers. The bill proceeded upon the ground of fraud and misrepresentation, and of inability on the part of the envoys and the contractor to perfect the security which they had undertaken to give for the loan, and amongst other things the bill alleged, that no such government as the *Peruvian* government had ever been acknowledged by his Majesty, and that in fact there was no such government in existence, but that *Peru* still remained a province and dependency of the kingdom of Spain.

The defendant *Kinder* by his answer admitted, that the *Peruvian* government had not been acknowledged as an independent state by the government of *Great Britain;* but he stated that there was in fact such a government in *South America*, and that it was an assumed government in opposition to the former government of *Spain* in that country, and had been formed by a revolution of the people in *Peru*, who had driven out the *Spanish* viceroy and established a government of their own; and he therefore denied that *Peru* still remained a province or dependency of the kingdom of *Spain*, and insisted that it was independent of *Spain*. The defendant further stated, that he was a holder of scrip on his own private account, and that he believed that the plaintiffs were not authorized by any of the other holders of scrip to institute the suit on their behalf, and that many of the other holders, if not all of them, were content to abide by their contracts to purchase such shares of the loan as they had respectively contracted to purchase, and were either ignorant of or disapproved the suit.

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The injunction prayed by the bill having been obtained *ex parte*, a motion was now made on the part of the defendant *Kinder* to dissolve it.

Mr. *Wetherell*, Mr. *Heald*, and Mr. *Roupell*, in support of the motion, argued, that the Court could not, under the circumstances of the case, interfere for the purpose of cancelling the loan, consistently with the general principle, that in order to set aside a contract misrepresentation or a fraudulent suppression of facts must be established; and they insisted that the plaintiffs could not sue on behalf of themselves and the other holders of scrip, as all the holders of scrip had not a common interest, and the object of the bill was to put an end to a transaction, which many of the subscribers had undertaken for their own benefit, and were willing to persevere in.

The LORD CHANCELLOR.

We all know that *Peru* was part of the dominions of *Spain*, and that *Spain* and this country are at peace, and that this country has not acknowledged the government of *Peru*; I want to know, whether, supposing *Peru* to be so far absolved from the government of *Spain* that it never can be attached to it again, the King's Courts will interfere at all while the Peruvian government is not acknowledged by the government of this country. What right have I, as the King's Judge, to interfere upon the subject of a contract with a country which he does not recognize? Another question is, whether, if individuals in this country choose to advance their money for the purpose of assisting a colony opposed to its parent state, that parent state being at peace with this country, the Courts of Justice

Whether the King's Courts will interfere upon the subject of a contract with a country which he does not recognize, or will assist in the recovery of money advanced by the subjects of this country to a colony at war with its parent state, the parent state being at peace with this country. Query.

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here will assist them to recover their money, and will not leave them to get it as they can? Practically speaking great inconvenience may result from these transactions, for if at any future time the government of this country shall be disposed to say, *Peru* shall still continue annexed to *Spain*, these creditors will immediately come to the government and say, do not accede to the arrangement unless *Spain* will pay us what we have advanced to the colony. The cases where one party files a bill on behalf of himself and others are cases where the others have a choice between that and nothing, but how can it be managed where some parties are not dissatisfied, and are disposed to abide by the contract.

The *Attorney-General*, Mr. *Shadwell*, and Mr. *Pemberton*, against the motion.

Assuming that the contract is against public policy the Court cannot be called upon to enforce it, but either party, though *particeps criminis*, may call upon the Court to rescind it. *Neville* v. *Wilkinson*.(*a*) *St. John* v. *St. John*. (*b*) *Vauxhall-bridge Company* v. *Spencer*.(*c*) *Morris* v. *M'Cullock*.(*d*) In *Pearce* v. *Piper* (*e*) the object of the bill was to adjust the rights of the parties, upon a suggestion that the original contract was vicious and could not be carried into effect, and upon the Master's report that it could not be carried into execution the contract was dissolved. In that case the bill was permitted to be filed by some, on behalf of themselves and others.

Mr. *Wigram* for the defendants the bankers.

(*a*) 1 B. C. C. 543.
(*b*) 11 Ves. 536.
(*c*) 2 Madd Rep. 356.
(*d*) Ambler. 432.
(*e*) 17 Ves. 1.

Mr. *Wetherell* in reply was stopped by

1823.

JONES v. GARCIA DEL RIO.

The LORD CHANCELLOR, who said, that the plaintiffs, if they had any demand at all, had each a demand at law, and each a several demand in equity; that they could not file a bill on behalf of themselves and the other holders of scrip, and as they were unable to do that, they could not, having three distinct demands, file one bill; and upon that ground alone, his Lordship, without again adverting to the question of public policy, dissolved the injunction.

CLUTTON *v.* PARDON.

July 24.

THIS was a motion to discharge the common order, made as of course by *The Master of the Rolls* upon the petition of *William Clutton*, the personal representative of *Thomas Clutton*, for the taxation of a bill of costs delivered by a solicitor, and for the delivery upon oath of all papers in the possession of the solicitor belonging to the petitioner upon payment of the bill. It appeared by the affidavit of the solicitor in support of the motion, that the papers in the cause came into his hands in the year 1799 as solicitor for the then defendants, the executors of the said *Thomas Clutton*, who were all since dead; that in the year 1807 an order was made in the cause, by which it was referred to the Master to tax all parties their costs of the suit as between solicitor and client; that in *April* 1812 his bill of costs on the part of the defendants, the executors, was left in the Master's office, and that in *June* 1812 the bill was taxed at 432*l.*; that in *June* 1817 300*l.* was paid to him on account of his bill, and that in *January*

A solicitor's bill having been partly taxed, and paid, an order, obtained as of course, referring the bill generally for taxation, was discharged with costs.

The conduct of the solicitor cannot be adduced in support of such an order, and the costs of affidavits upon that subject were ordered to be paid as between solicitor and client.

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1823 a copy of the bill, being in fact the bill by the order in question referred for taxation, shewing the balance of 132*l.* in his favour, was sent by him to the solicitors of the said *William Clutton*, by whom he had been applied to for the delivery of the papers belonging to the estate of the said *Thomas Clutton*; that the balance of 132*l.* was paid to him in *February* 1823, and that all the papers belonging to the estate of the said *Thomas Clutton*, had since been delivered by him to the said *William Clutton*. The affidavits in opposition to the motion, after impeaching the conduct of the solicitor, by imputing to him that he had been guilty of a breach of confidence, in having given to another person a paper in the cause of a private nature to be made use of for purposes prejudicial to the testator's family, proceeded to state, that the bill of costs carried into the Master's office had only been partly taxed in *June* 1812, several items having been marked as requiring further explanation; that the taxation had never been completed, and no certificate or report had been made by the Master; and that several items had been lately added to the bill which had never been taxed at all. It was further represented by those affidavits that, before the order in question was obtained, a special motion had been made before the *Vice Chancellor* for the taxation of the bill, and that his Honour had refused it, upon the ground that the object might be obtained by a common order, and that a notice of motion was unnecessary and irregular. (*a*)

Mr. *Hart* and Mr. *Barber* in support of the motion contended, that where a solicitor's bill had been paid and

(*a*) In *Ex parte Hewitt*, in the matter of *Morris*, Bucks Bank. Cas. 388. the *Vice Chancellor* is reported to have said, after consulting Mr. *Crofts* the Registrar, that the uniform practice was to order a solicitor's bill to be taxed as of course, and if there were any special circumstances in the case the solicitor might make a special application to the Court to modify or discharge the order.

the payment acquiesced in, the Court would not refer it for taxation as a matter of course, and cited *Langstaffe* v. *Taylor*, (*a*) and *Plenderleath* v. *Fraser*. (*b*)

Mr. *Wetherell* and Mr. *Ching* against the motion argued, that if upon the whole matter the bill must be taxed the Court would not discharge the order; they distinguished the case from those which had been cited by the want of acquiescence, and insisted that mere payment of a solicitor's bill was not sufficient to bar the right to taxation. They stated that the object of the parties in obtaining the order was to have the papers delivered up upon oath.

The LORD CHANCELLOR.

This is a motion to discharge an order made by the *Master of the Rolls* upon a petition perfectly of course, and in answer to such an application nothing more was required on the part of those who obtained the order than to shew that they were entitled to it as of course. The question of conduct has nothing to do with this case, and it was improper to enter into affidavits upon that subject with respect to an order of course and a motion to discharge that order. It is clear to me that as to those affidavits this order must be discharged with costs as between solicitor and client. If the conduct of the solicitor was such as to entitle the parties to a taxation of the bill on that ground, it ought to have been the subject of a special application. With respect to the point of practice, where a person means to have a bill taxed, if he thinks proper to pay that bill he does not thereby necessarily wave the right to taxation; he may intimate that he pays it without prejudice to taxation, and there may be cases where without one word being said he

(*a*) 14 Ves. 262. (*b*) 3 Ves. & Beam. 174.

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would have a right to have the bill taxed. Every attorney has a right to hold papers till his bill is paid; the language of every order which is made upon the subject is, that upon payment of what is due the papers shall be delivered over; but where a party has a pressing necessity for papers, the Court will order them to be delivered over upon a deposit being made, which will cover not only what is due upon the bill but what may be due for the costs of the taxation.

Where a party has a pressing necessity for papers in the hands of his solicitor the Court will order them to be delivered up upon a deposit being made sufficient to cover the amount of the solicitor's bill and the costs of the taxation.

With respect to the circumstances of this case, it was not explained to the solicitor that there was to be a taxation of his bill, but even if it had been so explained, what had passed before was sufficient to make the application for taxation the subject of a special motion, instead of a motion of course. If the bill was to be taxed under the order made in 1807, the proper course was to take out a warrant to go on with the taxation; unless I am mistaken that order would warrant the taxation of the costs of the suit up to the time of the Master's making his report, but for fear I should be mistaken about that I will lay it out of the case. It would be a long time before I could consent to say, that if a bill was carried into the Master's office for taxation, and the Master went through part of that bill, a party could come here upon a petition of course, not to have the authority of the Court to go on with the taxation already begun, but for an order for some other Master to begin again and tax the whole of that bill; but if upon the credit of the taxation the bill has been in part paid, how is it possible to say that a motion of course can be made to tax that bill. The only question which I have to decide is, whether this order has been regularly obtained; I think it has not been regularly obtained. Let the order be discharged with the common costs, and as to so much of the affidavits as relate to conduct, let the costs be paid as between solicitor and client.

An order directing the costs of the suit to be taxed warrants a taxation up to the time of the Master's making his report. *Semble.*

1823.

RODENHURST *v.* TUDMAN.

July 24.

Motion to stay the execution of a writ of enquiry of damages, not supported by the ordinary affidavit upon a motion to stay trial, refused with costs.

THE plaintiffs having suffered judgment by default in an action for breach of covenant brought against them as the executors of *James Rodenhurst* by the defendant *Tudman*, The *Attorney General* and Mr. *Phillimore* moved on their behalf, that the common injunction, which had been obtained for want of answer, might be extended to stay the execution of a writ of inquiry of damages, and of all further proceedings in the action, until the defendant *Tudman* should put in his answer, and the Court make further or other order to the contrary. The motion was supported by an affidavit that the rights of *Tudman* under the covenant were disputed by other parties, co-defendants to the bill, and could only be determined by a court of equity, and that the damages could not be safely assessed till the rights of all parties were determined by the Court, and accounts taken of the real and personal estates of *James Rodenhurst*, for which purposes the bill was filed.

The LORD CHANCELLOR, upon the motion being opened, said, I do not recollect any instance of staying trial, or staying the execution of a writ of inquiry of damages, except where a party wants discovery to aid him in the trial. This is in effect a motion to stay trial, and being a motion to stay trial, the question is whether there is the ordinary affidavit. Another objection to the motion is, that until there is a decree in this Court I have no right to prevent a man from going to judgment; can I say he shall not have a preference over other creditors?

Motion refused with costs.

1823.

ROLLS.
July 25.

WADE *v.* SAUNDERS.

The Court refused to take the consent of a married woman to give up her reversionary interest, in part vested and in part contingent, in a fund in Court, in favour of a purchaser from her husband.

EDWARD SAUNDERS, by his will dated the 8th of *October* 1799, gave and bequeathed to *Helen Saunders* her executors administrators and assigns, the sum of 6,000*l.*, upon trust to invest the same in some public stocks or funds, and to pay the dividends or interest thereof to his daughter *Helen Wade* and her husband *John Wade* during their lives and the life of the survivor, and after the death of the survivor, upon trust for the children of his said daughter *Helen Wade* by her said husband *John Wade*, equally to be divided between them on their severally attaining the age of twenty-one years, with benefit of survivorship in case of the death of any of them under that age.

After the death of the testator this suit was instituted, and the legacy of 6,000*l.* was, under the directions of the Court, invested in the purchase of 11,000*l.* 3 per cent. consol. Bank annuities, which was transferred into the name of the Accountant-general in trust in the cause.

A petition was now presented by *Matthew Handcock* and *Helen Maria* his wife, and by *John Samuel Schwenck*, which, after stating to the effect above stated, and that the said *John Wade* and *Helen* his wife were still living, and had nine children, and that the petitioner *Helen Maria Handcock* was one of those children and had attained her age of twenty-one years, but that seven of the other children were under that age, went on to state, that the petitioners *Handcock* and wife had contracted with the petitioner *Schwenck* for the sale to him of their reversionary interests, as well vested as contingent, in the said sum of 11,000*l.* 3 per cent. consol. Bank

annuities, but that the petitioner *Schwenck* was unwilling to complete the purchase, unless the petitioner *Helen Maria Handcock* would forego all her rights in the said stock; the petition therefore prayed, that the petitioner *Helen Maria Handcock* might be examined for the purpose of testifying her consent to the transfer of her share or shares of the said stock to the petitioner *Schwenck*.

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The MASTER OF THE ROLLS, upon the petition being opened, refused to take the consent.

Mr. *Barber* for the petition.

HUGHES *v.* WYNNE.

ROLLS.
July 28.

Where real estates are devised in trust for the payment of debts, in aid of the personal estate, the statute of limitations does not run in equity after the death of the testator.

ROBERT WATKINS WYNNE, by his will, dated the 15th of *October* 1805, directed that all his just debts and funeral and testamentary expences should be fully paid and satisfied, out of his personal estate as far as the same would extend, and afterwards out of the fund thereinafter directed and appointed for that purpose; and after giving several pecuniary legacies, charged upon the surplus monies to arise from the sale of an estate, which, by an indenture dated the 5th of *October* 1805, he had conveyed to trustees in trust to sell for the purpose of discharging several incumbrances and debts, including the simple contract debts then due and owing from him, the testator gave and devised certain other estates to trustees for the term of 500 years, as an auxiliary fund for raising such sum as might be wanted, in aid of his personal estate and the estate directed to be

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HUGHES v. WYNNE.

sold, for the payment and discharge of his debts and funeral expences; and he authorized his trustees to raise, by mortgage of the estates comprized in the term, such sums of money as might be wanted for the purpose last mentioned. The testator died in 1806, and by the decree in this suit, which was instituted by the trustees in 1814, it was referred to the Master to take an account of his debts with the usual directions.

The Master by his report stated, that several charges had been brought in before him on behalf of persons claiming to be creditors of the testator in respect of debts due to them on simple contract, but that the testator having died in 1806, and the bill in this cause not having been filed till 1814, a period of eight years without any proceedings being taken for the recovery of the said debts, he had not thought fit to allow the same, conceiving them to be barred by the statute of limitations. One of the creditors by simple contract having excepted to this report, the exception now came on to be argued.

Mr. *Agar* for the exception contended, that where a trust was created for the payment of debts they could not be barred because the trustee did not execute the trust; he cited Executors of *Fergus* v. *Gore*, (*a*) and *Morse* v. *Langham*. (*b*)

Mr. *Wingfield* in support of the Master's report argued, that the creditors having omitted to claim for so long a period the Court would, by analogy to the statute of limitations, assume that their claims had been satisfied.

Mr. *Shadwell*, Mr. *Roupell*, Mr. *Tinney*, and Mr. *W. Parker*, appeared for the other parties.

(*a*) 1 Sch. & Lef. 107. (*b*) 2 Ves. & Beam. 286.

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The question is how the debt stood at the death of the testator; it is not to be inferred that a man has no debt, because he does not go to law to enforce payment when he has a trustee to pay him.

The exception was allowed.

COOKE *v.* DAVIES.

July 26, 30, 31.

THE bill in this cause was filed on the 14th of *July* 1821, and an answer having been put in, the bill was amended; the defendant put in her answer to the amended bill on the 4th of *February* 1822, and on the 21st of *June* following the plaintiff obtained a second order to amend; on the 10th of *April* 1823, no amendment having been made, the defendant moved to discharge the order to amend and to dismiss the bill for want of prosecution, but the plaintiff met the motion by undertaking to amend within ten days; he accordingly amended his bill within the limited time and also amended the defendant's office copy, but he neither filed a replication to the answer nor served a subpœna to answer the amendments; the defendant therefore, on the 13th of *July* following, obtained the common order to dismiss the bill for want of prosecution, upon the allegation, that no further proceedings had been had in the cause since the answer was put in to the amended bill.

A motion was now made to discharge the order of dismission for irregularity.

Where a plaintiff amended his bill after answer, but did not serve a subpœna to answer the amendments or file a replication to the answer, an order obtained as of course to dismiss the bill for want of prosecution, after three terms from the filing of the answer, but within three terms from the date of the amendments, was held to be regular, though the defendant had obtained an order that the plaintiff should amend his bill within a limited time, and the plaintiff had amended accordingly, and had also amended the defendant's office copy of the bill.

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COOKE v. DAVIES.

Mr. *Heald* for the motion.

Mr. *Richards* against it.

The LORD CHANCELLOR.

Where a bill is amended after answer, but no subpœna is served to answer the amended bill, the amendments go for nothing.

I have always understood, that if a bill is filed, and an answer is put in, and then an order is obtained to amend, and the bill is amended, but no subpœna to answer the amended bill is served, the amendments go for nothing. The question is, whether it makes any difference, that after the order to amend, the defendant obtained an order that the amendments should be made within ten days, and the amendments were made within that time.

The *Registrar* was directed to enquire into the practice, and upon the result of that enquiry the motion was refused with costs.

HARRIS *v.* LLOYD.

July 8.
August 1.

Illegitimate children not entitled under the description of children in a will, the intention not being sufficiently apparent upon the face of the will.

Legacy in trust for the children of *A.* to be equally divided between them with benefit of survivorship and a provision for maintenance out of the interest, *A.* having no children at the death of the testator: held that after-born children would take, and that the interest till the birth of a child fell into the residue.

EDWARD HARRIS, by his will dated the 10th of *October* 1809, devised to his executors all the estates of which he was seized in mortgage, upon trust, on payment of the mortgage monies, to convey the same to the persons entitled to the equity of redemption thereof; and after bequeathing the sum of 5,000*l.*, part of the monies to be received in respect of the mortgages, upon certain trusts for the benefit of *Edward Goring* and *James Goring*, he directed his executors to invest the residue of such monies upon mortgage or in the funds, and to stand possessed of the same, in trust for all and every

the child and children of his son *Edward Harris*, if more than one to be equally divided between them share and share alike, the shares of sons to be vested at twenty-one, and to be paid or transferred at twenty-five, and the shares of daughters to be paid or transferred at twenty-one or marriage, with benefit of survivorship as to the shares of children dying under twenty-one, and a direction that until the shares of the children should become payable, the dividends and interest of the trust funds or securities should be applied in their maintenance and education; the testator gave to *Sarah Byrne* all the rest and residue of his estate and effects.

After the death of the testator a suit was instituted by *Edward Goring* and *James Goring*, and by three infants who were represented to be the children of *Edward Harris* the son, for an account of the monies due to the testator upon mortgage at the time of his decease, and the mortgage monies, amounting to the sum of 8,400*l.*, having been received by the executors, were paid into Court and invested. By the decree part of the fund in Court was appropriated to answer the legacy of 5,000*l.*, and it being declared that the infant plaintiffs, if they were the only children of the said *Edward Harris* the son, were entitled to the remainder of the fund, it was referred to the Master to enquire what children the said *Edward Harris* the son had at the testator's death, and whether he had had any children born since that time. In the further progress of the suit, the Master having reported that *Edward Harris* the son had at the death of the testator three children only, the three infant plaintiffs, and that he had had no child born since the testator's decease, an order was made that the interest of the unappropriated part of the fund in Court should be applied in the maintenance of the infant plaintiffs, their father not being of ability to maintain them. The payment of maintenance was afterwards suspended by an order dated the 1st of *February*

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1821, made upon the petition of the defendants the executors, stating, that no proof had been adduced of *Edward Harris* the son having ever been married, and submitting, that the infant plaintiffs, if they were illegitimate, were not entitled to any benefit under the will of the testator. A supplemental bill was then filed by the infants, stating, that they were always treated by the testator as his grand-children, and boarded and maintained at his expence, and that *Edward Harris* their father had no other child, and setting forth a deed, dated subsequently to the filing of the original bill, by which *Sarah Byrne* assigned to trustees, in trust for them, all such interest in the funds in question as she was entitled to as residuary legatee of the testator, in case there were no children of the said *Edward Harris* the son to take by that description under the testator's will.

A petition presented by the infants, insisting that they were entitled to the dividends of the unappropriated part of the fund in Court by virtue of the deed, independently of the question of legitimacy and the effect of the bequest contained in the testator's will, and therefore praying that the order of the 1st of *February* 1821 might be rescinded, and that the dividends accrued and to accrue due upon the fund in question might be applied in their maintenance, now came on to be heard with the supplemental suit.

Mr. *Sugden* and Mr. *Willis* in support of the petition.

Without entering into the question whether the description in the will comprehends illegitimate children, the infants are entitled to the interest of the unappropriated fund in Court under the deed executed by Mrs. *Byrne*, upon the ground, either that the gift of the residue of the mortgage money is an immediate gift to a class of persons who must be living at the death of the testator,

and that there not having been then any legitimate children the gift altogether failed, and the particular residue fell into the general residue; or that the interest of the particular residue until the birth of a legitimate child is undisposed of, and forms part of the general residuary estate. Upon the first point they relied upon the provision for maintenance, as evidence of intention that the persons who were to take the fund were to be in existence at the death of the testator, and cited *Godfrey* v. *Davis*, (*a*) and *Davidson* v. *Dallas*. (*b*) Upon the second point they cited *Wyndham* v. *Wyndham*, (*c*) *Shawe* v. *Cunliffe*, (*d*) and *Leake* v. *Robinson*. (*e*)

Mr. *Shadwell* and Mr. *Seymour* for the executors.

Mr. *Spence* for *Edward Goring* and *James Goring*.

The LORD CHANCELLOR.

Three questions arise in this case; first, whether the persons who claim as children are children within the meaning of the testator and according to the legal construction of the word; secondly, whether the intention of the residuary legatee in favour of those persons can, as it respects the principal of the fund, be carried into execution, regard being had to the circumstance that the individual whose illegitimate children have been considered to be the persons intended by the testator may have legitimate children; and thirdly, whether, according to the cases of *Wyndham* v. *Wyndham* and *Shawe* v. *Cunliffe*, the interest of the residue of the mortgage money does not fall into the general residue until there is a legitimate child; I have not the least doubt that this testator meant illegitimate children, but I am clearly of opinion that there

(*a*) 6 Ves. 43.
(*b*) 14 Ves. 576.
(*c*) 3 B. C. C. 58.
(*d*) 4 B. C. C. 144.
(*e*) 2 Meriv. 363.

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is not enough upon the face of this will to authorize me to carry that intention into effect. (*a*) With respect to the bulk of the residue of the mortgage money, if there shall be legitimate children, it will become their property. With respect to the interest of that residue, upon the best consideration which I can give the subject, I think this case falls within the authority of the cases in which it has been held, that where there is an interval in which the interest is not disposed of expressly by the will before the persons come into existence who are to take the capital the interest falls into the residue.

The interest of a legacy not expressly disposed of by a will till the persons come into existence who are to take the capital falls into the residue.

The order was accordingly made.

(*a*) *Cartwright* v. *Vawdry*, 5 Ves. 530. *Swaine* v. *Kennerley*, 1 Ves. & Beam. 469.

IN RE MAGOR.

July 28.
August 4.

IN the year 1820 the lessees of the tithes of a parish in the diocese of *Exeter* instituted a suit in the consistorial court of the diocese against *John Magor* for the subtraction of the tithes of corn; the defence made to the suit was, that the lands in respect of which the tithes were demanded were down to the year 1817 barren and unproductive, and were therefore by law exempt from the payment of tithes; witnesses having been examined by both parties on the subject of the exemption set up by the defendant, the cause was heard before the *Chancellor* of the diocese of *Exeter* on the 20th of *July* 1822, but before sentence was pronounced an order was made by his Honour the *Vice Chancellor*, prohibiting the Chancellor of the diocese and the lessees of the tithes from further proceeding upon

Upon a motion for a prohibition a copy of the libel in the ecclesiastical court verified by affidavit and a suggestion on parchment setting forth the libel and the ground of the prohibition prayed must be delivered into Court, and if the prohibition is granted affidavits of the truth of the facts suggested must be filed within six months.

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the matters in question in the consistorial court, and directing a writ of prohibition to issue accordingly; this order was obtained upon the motion of Mr. *Knight* made *ex parte* and supported by an affidavit, which, after setting forth the substance of the pleadings in the consistorial court, and stating the belief of the deponent that the lands in respect of which the tithes were demanded were barren and unproductive down to the year 1817, and were exempt from the payment of tithes under the provisions of the statute 2d & 3d *Edw.* 6. *c.* 13., (*a*) alleged, that before the ecclesiastical judge, do sue for any prohibition in any of the King's courts where prohibitions before this time have been used to be granted, that then in every such case the same party, before any prohibition shall be granted to him or them, shall bring and deliver to the hands of some of the justices or judges of the same Court where such party demandeth the prohibition, the very true copy of the libel depending in the ecclesiastical Court, concerning the matter wherefore the party demandeth the prohibition, subscribed or marked with the hand of the same party; and under the copy of the said libel shall be written the suggestion wherefore the party so demandeth the said prohibition; and in case the said suggestion, by two honest and sufficient witnesses at the least, be not proved true in the Court where the said prohibition shall be so granted, within six months next following after the said prohibition shall be so granted and awarded, that then the

(*a*) The 5th and 14th sections of this statute are in the following words:—

Section 5.—Provided always, and be it enacted by the authority aforesaid, that all such barren heath or waste ground, other than such as be discharged for the payment of tithes by act of Parliament, which before this time have lain barren and paid no tithes by reason of the same barrenness, and now be and hereafter shall be improved and converted into arable ground or meadow, shall from henceforth, after the end and term of seven years next after such improvement fully ended and determined, pay tithe for the corn and hay growing upon the same; any thing in this act to the contrary in any wise notwithstanding.

Section 14. — Be it further enacted by the authority aforesaid, that if any party at any time hereafter, for any matter or cause before rehearsed, limited or appointed by this act, to be sued or determined in the King's ecclesiastical court, or

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the trial of the question whether lands were barren or not barren within the before mentioned statute belonged, as the deponent was advised and believed, to the temporal courts of the realm and not to any spiritual court. (*a*) On the 11th of *December* 1822 a writ of prohibition issued according to the order, (*b*) and on the 26th of *March* following a further affidavit was, in compliance with the requisitions of the statute, filed by *Magor* and two other persons to the same effect as the affidavit upon which the order was obtained.

A motion was now made on behalf of the lessees of the

party that is letted or hindered of his or their suit in the ecclesiastical court by such prohibition, shall upon his or their request and suit, without delay, have a consultation granted in the same case in the Court where the said prohibition was granted; and shall also recover double costs and damages against the party that so pursued the said prohibition, the said costs and damages to be assigned or assessed by the Court where the said consultation shall be so granted; for which costs and damages the party to whom they shall be awarded may have an action of debt, by bill, plaint or information, in any of the King's courts of record, wherein the defendant shall not wage his or their law, nor have any essoign or protection allowed or admitted.

(*a*) *Anon.* 1 Keb. 253.

(*b*) The mandatory part of the writ was in the following form: "We therefore, willing to maintain the laws and rights of our Crown of England, as by the obligation of our oath we are bound, and unwilling that our liege subjects should be injured by suspension in contradiction thereto, do prohibit you and each of you, firmly enjoining that you do not further proceed in the premises against the said *John Magor*, nor any further hold plea before you touching the premises, nor that you or any of you attempt any thing that may tend to the damage of the said *John Magor*, or to our prejudice, or in derogation or contempt of the laws statutes and customs of our kingdom of England, or to the hurt of our Crown, under the damages of incurring the penalty of the violations of our laws; and if you have pronounced judgment against him the said *John Magor* by reason of the premises release him therefrom, and absolutely absolve him from the same on the peril incumbent."

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tithes, that the order of the *Vice Chancellor* might be discharged, and that the prohibition issued by virtue thereof might be superseded for irregularity, or that a writ of consultation might issue directed to the proper officer of the consistorial court of *Exeter*, and that the said *John Magor* might be ordered to pay to the lessees all costs occasioned thereby and by such supersedeas, to be taxed according to the statute in that case made and provided.

Mr. *Shadwell* and Mr. *Pemberton* in support of the motion.

The formalities prescribed by the statute not having been pursued, the writ of prohibition in this case has issued irregularly. The statute requires that a copy of the libel in the ecclesiastical Court shall be delivered to the judge from whom the prohibition is demanded, with the suggestion underwritten why the party demands the prohibition; and it appears from Sir *Gilbert Gerrard* and *Sherrington*'s case (*a*) always to have been considered necessary that surmises should be delivered to the Court. There are many cases in *Coke*'s entries (*b*) which shew that the old mode of proceeding, where a person sued in the ecclesiastical Court considered himself entitled to a prohibition, was, for the party to declare in prohibition; issue was joined; the facts were found by a jury; and the judgment of the Court was pronounced upon the finding of the jury; but the modern practice of the courts of law is to grant prohibitions upon motion. The courts of law however, whether the application is made upon motion or by declaration in prohibition, take care that an opportunity shall be afforded to the adverse party of disproving the facts upon which the prohibition is applied for. It is not disputed that this Court may issue the writ upon mo-

(*a*) 1 Leon. 286. (*b*) Prohibition 448.

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tion; (*a*) but in *Sibley* v. *Crawley* (*b*) it was said that a prohibition was not duly granted upon an *English* bill, and from that case it may fairly be inferred that a prohibition ought not to issue from this Court till after trial of the facts. Some opportunity should be given of trying the question whether the prohibition ought to issue. (*c*) In *Blackborough* v. *Davis* (*d*) it is said that the prohibition should be returnable into the King's Bench or Common Pleas. The conduct of the party has precluded him from any right which he might have had; having permitted the question to be tried in the ecclesiastical Court, he cannot now be allowed to come to this Court and complain of that trial. *French* v. *Trask*. (*e*)

Mr. *Knight* against the motion contended, that the question between the parties was of such a nature that the common law would not permit the trial of it to be entrusted to the ecclesiastical Court, and relied upon the affidavits as a compliance with the requisitions of the statute; he cited 4 Institute 81, as an authority that the writ ought not to be returnable.

The LORD CHANCELLOR.

Do the courts of common law, when they grant a prohibition, require that the affidavit should state a copy of the libel? The reason I ask is, that in case the truth of the suggestion is not proved within a given time after the prohibition is granted the Court which granted the prohibition is to grant a consultation; and then the statute gives an action. Now if the action is brought how can it be maintained if it can be shewn that the prohibition was

(*a*) *Anon.* 1 P. Wms. 475.

(*b*) Cro. Eliz. 736.

(*c*) In *Saunderson* v. *Clagget*, 1 P. Wms. 657, a prohibition *nisi causa* seems to have been granted by the Master of the Rolls.

(*d*) 1 P. Wms. 43.

(*e*) 10 East. 348.

granted without the affidavit which the statute requires. I will communicate with the judges of the Court of King's Bench upon the subject.

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August 4.

The chief justice of the King's Bench has stated to me that the practice of the Court of King's Bench is in exact conformity with the statute 2 & 3 *Edw.* 6.; upon a motion for a rule to shew cause why a prohibition should not issue, a copy of the libel in the ecclesiastical court verified by affidavit and a suggestion on parchment setting forth the libel and the ground of the prohibition prayed are delivered into Court, and if a prohibition is granted affidavits of the truth of the facts suggested are filed within six months. The consequence is, that unless it can be shewn that the statute does not apply to the Court of Chancery as well as to the Court of King's Bench this prohibition has improperly issued. I can find nothing in the statute to distinguish this Court from the Court of King's Bench, and the prohibition therefore must be superseded.

His Lordship doth order that the said writ of prohibition be superseded.

Reg. lib. 1822. B. 3. 1600.

JARVIS *v.* CHANDLER.

August 2, 4.

Injunction granted to stay proceedings

A suit having been instituted in the Admiralty Court by *Elizabeth Stephens* for the recovery of the sum upon a sentence in the Admiralty Court, new evidence having been discovered at a period when, according to the practice of that Court, it could not be received.

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of 64*l.* 14*s.* alleged to be due to her for wages as Cook and Steward of a small trading vessel, the owners of the vessel defended the suit, on the ground that *Elizabeth Stephens* was in fact the wife of *Christopher Chandler* the captain of the vessel, and was not therefore entitled to any wages. Until a late stage of the cause in the Admiralty Court, when according to the rules of that Court no new evidence could be received, the owners were unable to procure satisfactory proof of the marriage of *Christopher Chandler* and *Elizabeth Stephens*, but it was then discovered that those persons had repeatedly admitted that they were married, and that the proceedings in the Admiralty Court were taken with the privity, and for the benefit of *Chandler*.

Under these circumstances, *Elizabeth Stephens* having obtained sentence in her favour in the Admiralty Court, the owners filed a bill in this Court against her and her husband for an injunction to restrain them from proceeding to enforce the sentence.

Mr. *Hart* and Mr. *Koe* now moved for the injunction, and that service of it on the defendant's Proctor might be deemed good service, upon certificate of bill filed, and an affidavit stating the facts of the case, and that the defendants could not be found.

The LORD CHANCELLOR expressed a doubt whether he ought to grant the injunction, as there was no direct evidence of the marriage; observing, that nothing was more easy than to obtain evidence of the declarations of persons in such a situation of life that they were married, though in fact they were not. His Lordship desired the motion to be mentioned again.

August 4. Mr. *Hart* and Mr. *Koe* now contended, that this case resembled those in which the Court had interfered by injunc-

tion to restrain proceedings on a judgment at law, where circumstances had been afterwards discovered, which rendered it inequitable that the plaintiff should reap the fruits of that judgment.

The LORD CHANCELLOR.

Upon payment into Court of the sum recovered and of the costs in the Admiralty Court you may take the injunction till answer or further order. My judgment proceeds upon the notion that the proceedings in the Admiralty Court are perfectly right. The question is whether this is not the same special case as if there had been a trial at law and a verdict obtained to be affected in equity by subsequent discovery.

His Lordship doth order, that the said plaintiffs do, on or before the first seal before next Michaelmas term, pay the sum of 64*l.* 14*s.* and the defendant's taxed costs in the Admiralty Justice Court into the Bank to the credit of this cause, subject to the further order of this Court; and it is ordered, that the said defendants *Christopher Chandler* and *Elizabeth* his wife, otherwise *Elizabeth Stephens*, and their proctors or agents, be restrained by the injunction of this Court from applying to the Admiralty Justice Court for or issuing any process to compel execution of the sentence obtained by the said defendant *Elizabeth Stephens*, otherwise *Chandler*, in the said Court, until the said defendants shall fully answer the plaintiffs bill or this Court make other order to the contrary; and it is ordered that service of the said injunction on *Frederick Clarkson*, the said defendant's proctor or agent, be deemed good service on the said defendants.

Reg. Lib. 1822. A. 3. 2248.

On the first seal before Michaelmas term application

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was made that the time for paying in the money might be extended, upon an affidavit, that although diligent search had been made for the defendants, in order to serve them with a subpœna, they had not been found; and the Court extended the time for one month.

Several subsequent applications were made of the same nature upon similar affidavits, and ultimately the Court ordered, that the time for paying in the money should be extended until one month after the defendants should have put in their answers to the bill.

August 5, 7.

STREET *v.* STREET.

The writ of *Ne exeat regno* does not issue for alimony after a decree in the Ecclesiastical Court pending an appeal from that decree.

THE bill in this cause stated, that the plaintiff, a married woman, had instituted a suit in the Ecclesiastical Court of *Exeter*, against the defendant, her husband, for a divorce, and had obtained a decree for alimony with costs. The bill then stated that arrears of alimony and costs were due to the plaintiff, and prayed the writ of *Ne exeat Regno* against the defendant.

The defendant by his answer stated, that he had appealed against the sentence of the Court at *Exeter*, as to the alimony allotted to the plaintiff, to the Court of Arches, and that such appeal was pending before the bill was filed, and that the plaintiff having, before filing her bill, applied to the Court of Arches in the matter of the said appeal for alimony pending such appeal, that Court had allotted to her, *pendente lite*, the same alimony which before sentence in the Court at *Exeter* had been allotted there, *pendente lite*, namely, 19*s*. a-week The defendant further stated, that he was advised, that by the Ecclesiastical law, and

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according to the practice of the Ecclesiastical Court, the plaintiff had not under the circumstances become entitled to receive from him any alimony whatever, save the said sum of 19*s.* a-week.

The writ, which had been granted upon the filing of the bill, was discharged by the Vice Chancellor upon the coming in of the answer.

Mr. *Hart* and Mr. *Rose* now moved to stay the order for discharging the writ, and contended that the decree of the Ecclesiastical Court must be considered to be good till it was judicially reversed; and to shew the competency of the Court to grant the writ after a decree for alimony, they cited *Shaftoe* v. *Shaftoe* (*a*), *Dawson* v. *Dawson* (*b*), and *Haffey* v. *Haffey* (*c*).

Mr. *Knight* opposed the motion.

The LORD CHANCELLOR.

The Ecclesiastical Court, looking at the obligation upon the part of the husband to maintain his wife so long as she is his wife, gives alimony *pendente lite* until a decree is made; but, if I recollect the authorities, this Court will not grant the writ of *Ne exeat regno* for interim alimony before a decree. It strikes me, that according to the practice of the Ecclesiastical Courts, if there is an appeal, the alimony given by the decree is not understood to be due. The question therefore comes to this, whether, if the Ecclesiastical Court, when there is an appeal, considers the matter as undetermined, and revives the alimony *pendente lite*, things are not exactly in the same state after the decree as before it.

The writ of *Ne exeat regno* is not granted for interim alimony before a decree.

(*a*) 7 Ves. 171. (*b*) 7 Ves. 178. (*c*) 14 Ves. 261.

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The LORD CHANCELLOR.

From the information which I have received as to what the Court which makes the decree for alimony considers to be the effect of its own judgment, I am of opinion that this writ ought not to be granted.

August 16.

OSTLE *v.* CHRISTIAN (*a*).

A solicitor cannot obtain the taxation of his agent's bill without bringing the amount into Court.

A Solicitor in the country having obtained the common order in this cause, by petition of course at the Rolls, for the taxation of a bill of 134*l.* delivered by his agent in London, and for the delivery of all papers in the possession of the agent on payment of the taxed amount of the bill, a motion was made on the part of the agent to discharge that order. The motion was supported by an affidavit, from which it appeared, that a sum of 87*l.* was due from the solicitor in the country to the agent in London on a bill previously delivered.

The *Attorney-General* and Mr. *Glyn* in support of the motion contended, first, that the order was irregular, on the ground that an agent's bill not being within the statute, an order to tax it could only be obtained on the terms of the amount being brought into Court; and secondly, that the solicitor had not acted with good faith in obtaining an order for the delivery of the papers on payment of the last bill only, suppressing the fact of the previous bill remaining unpaid.

(*a*) *Ex relatione* Mr. Glyn.

Mr. *Hart* against the motion.

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The LORD CHANCELLOR concurred in the opinion that a solicitor could not obtain the taxation of his agent's bill without bringing the amount into Court, and ultimately discharged the order with costs, observing, that in the petition at the Rolls no mention had been made of the bill for 87*l.*, and that the agent ought not to have been called upon to deliver up the papers until that bill was paid.

August 20.

Ex parte THOMAS PEARSE and Others, in the matter of JOHN WARREN PEARSE a Lunatic.

The costs of the Committee of a lunatic trustee, conveying under the statute, must be paid by the *cestui que trusts*.

The estate being vested in the lunatic upon trusts for securing an annuity, and subject thereto upon trust for the grantor of the annuity, the grantee and the assignees of the grantor of the annuity were ordered to defray equally the Committee's costs of an application by them for a reconveyance of the estate.

JOHN GOODWIN granted an annuity to *Thomas Pearse*, and demised an estate to *John Warren Pearse* for the term of 500 years upon trusts for securing the annuity, and subject thereto upon trust for *Goodwin*. The annuity-deed contained a clause empowering the repurchase of the annuity; and it was provided by the deed, that in the event of a repurchase, the grantee of the annuity his executors administrators and assigns should, at the request costs and charges of the grantor his heirs, executors administrators or assigns, convey or cause to be conveyed to him or them, the premises comprised in the term.

John Goodwin having become bankrupt, his assignees were desirous of repurchasing the annuity, and by an order made in the lunacy, upon a petition presented by the assignees jointly with *Thomas Pearse* the grantee of

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the annuity, it was referred to the Master to enquire whether *John Warren Pearse* was a trustee within the intent and meaning of the statute 4 *Geo.* 2. *c.* 10., and for whom.

The Master having reported that the lunatic was a trustee within the intent and meaning of the statute, for *Thomas Pearse*, the grantee of the annuity, a further petition was presented by the said *Thomas Pearse*, and by the assignees of *Goodwin*, praying that the report might be confirmed, and that the premises comprized in the term might be conveyed to the assignees.

Upon the hearing of this petition, a question arose as to the costs of the Committee, and the *Lord Chancellor* ordered the costs to be paid according to the settled rule.

The minutes of the order directed the Committee's costs of all the proceedings, except the conveyance, to be paid by the grantee of the annuity, and the costs of the conveyance to be paid by the assignees of the grantor, and the question of costs having been again mentioned, the following statement with respect to the practice was furnished to the *Lord Chancellor* by the secretary of lunatics.

Lunatic Trustees and Mortgagees.

These cases are provided for by the 4th Geo. 2. c. 10, but it is silent as to costs, and until the time of Lord *Rosslyn* costs were neither prayed nor directed by the orders made for confirming the report and conveying the estate in trust or mortgage; the rule being, for the *cestui que trust* in the one case to pay the costs on the Committee conveying the trust-estate, and for the Committee in the other to acquire the authority for executing a reconveyance on payment of the money due on the mortgage and

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the ordinary costs attending the reconveyance. It is only in modern practice that any question has been raised as to the costs in these cases, and in the case of a lunatic trustee which occurred in the lunacy of *Tufnell* on the 4th *April* 1808, Lord *Harcourt* sought a conveyance of the trust estate by the Committee, after the Master had reported the case to be within the statute, and an order was made to that effect by Lord *Eldon*, in which the costs of the Committee were directed to be paid by the petitioner the *cestui que trust*.

It has lately been attempted to throw the costs of a lunatic trustee on his own estate, on the authority of a case, Ex parte *Brydges*, reported by Mr. *Cooper*, where the costs of the Committee were directed to be taxed and paid out of the lunatic's estate; but upon referring to the minutes of that order, it appears that no question whatever as to costs was made at the hearing, and that a direction to that effect was added for the indemnity of the Committee, who had omitted to obtain his costs from the *cestui que trust*. In the case of *Pearse* a lunatic, who has been found to be a trustee within the statute, a question has been raised by the *cestui que trust* as to the costs in consequence of Mr. *Cooper's* report of the above case of Ex parte *Brydges*, but it is perfectly clear that, according to the old rule, as well as the modern practice, except Mr. *Cooper's* case, the costs of the Committee ought to be paid by the *cestui que trust* as directed in the order, and not out of the lunatic's estate.

The LORD CHANCELLOR finally ordered that the Committee's costs of the original petition, and of the reference to the Master and consequent thereon, and of the application and incident thereto should be paid by the grantee of the annuity and the assignees of the grantor in equal moieties; and declared the general rule to be, that the

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costs of the Committee of a lunatic trustee conveying under the statute, must be paid by the *cestui que trust*.

Mr. *Hart* for the Petition.

Mr. *Swanston* for the Committee.

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Nov. 5.

ATTORNEY GENERAL *v.* DOVE.

Where, in a charity-information, the relators are allowed their costs of proceedings which the Attorney General has attended separately by his own solicitor, without an order of the Court for so doing, the Attorney-General will not be allowed his separate costs.

IN this suit a petition was presented by the defendant, praying the confirmation of the Master's Report, various consequential directions, and the payment of the costs of some of the proceedings.

Mr. *Pollen*, for the petition.

Mr. *Roupell*, for the *Attorney General*, asked, that in the order provision might be made for the payment of the *Attorney General's* costs separately from those of the relators. This was proper and necessary; because, in the prosecution of the inquiries which had been directed, the same solicitor having appeared both for the relators and for the defendant, a suspicion of collusion had been excited in the Master's mind, and, at the suggestion of the Master, the *Attorney General* had attended by his own solicitor to watch the progress of the suit.

Mr. *Wingfield* and Mr. *Pepys* for the relators.

The *Attorney General* and the relators cannot both of them have their costs; for a charity-information is not to be burthened, at the mere pleasure of the *Attorney General*, or even of a Master, with two sets of plaintiffs. On

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which of the two, then, must the loss fall? Not surely on the relators, against whom there is not even an accusation of having neglected their duty in the management of the suit. On the other hand, if the *Attorney General* has incurred any costs apart from those of the relators, he has incurred them improperly; for, when he permits relators to use his name, he has no right to appear by a solicitor distinct from theirs. In the case of the *Attorney General* v. *The Corporation of Huntingdon* (*a*), a similar application on behalf of the *Attorney General* was refused by the *Vice Chancellor*.

The MASTER OF THE ROLLS.

Where the *Attorney General* institutes an information at the instance of relators, it is not the ordinary practice of the Court to allow him separate costs: And I am most unwilling to establish a precedent, which may tend to increase the expences of such suits. The conduct of the cause is with the relators; and they have usually, in all the proceedings, all the costs known to the Court. There is no authority in support of the demand which the *Attorney General* now makes: and the case of *The Corporation of Huntingdon* is a strong authority against him. Such is the general rule; and to exclude its application, a special case must be made.

(*a*) This case, (according to the statement made at the bar) came before the Court in 1821. It was an information, in which the *Attorney General*, having attended some of the proceedings by his own solicitor, claimed costs separately from the relators. The *Vice Chancellor* expressed himself astonished at the application. The relators, his Honor said, were entitled to their costs, for they had conducted the suit properly; but he did not see how he could burthen the charity fund with an additional set of costs. Finally, the *Vice Chancellor* offered the *Attorney General* an inquiry as to whether it was customary to allow separate costs to relators and to the *Attorney General*. This offer, however, the *Attorney General* did not think proper to acccpt.

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The only circumstance, which is stated as a reason why in this suit the *Attorney General* should have costs allowed him separately, is, that it was in consequence of a suspicion entertained in the Master's office, of collusion between the relators and the defendant, and in compliance with a suggestion coming from the Master, that the *Attorney General* attended the proceedings by a distinct solicitor. But the Master had no power to alter the course of practice or to increase the expences of the suit. If there was ground for suspecting collusion, application ought to have been made to the Court, when the matter would have been put into a course of inquiry. The *Attorney General*, in appearing by his own solicitor, acted without the privity and sanction of the Court; and the Court cannot now take any notice of the occurrences in the Master's office which induced him to do what he has done. The case, therefore, must be considered as standing on the general rule.

Mr. *Roupell* submitted, that, as the *Attorney General* had been served with the petition separately from the relators, he ought to be allowed at least the costs of the petition.

The Court, however, refused him even this portion of the costs.

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WEST *v.* AYLES.

A trustee, who is in a state of mind which renders him incompetent to the management of business, may refuse to transfer within the meaning of the 36 Geo. 3. c. 90. s. 1.

BY a decree made on the 17th of *June* 1823, *Matthews* and *Ayles*, the surviving executors of a testator were ordered to transfer 1068*l.* 19*s.* 9*d.* into the name of the *Accountant General*.

Ayles had fallen into a state of mind, which rendered him incompetent to the management of business; but no commission of lunacy had been issued against him.

A petition was now presented under the 36 Geo. 3. c. 90. s. 1. (*a*) It alleged, that *Ayles* had peremptorily refused to join in transferring the stock, or to sign any power of attorney or other instrument to authorize the transfer of it. The prayer was, that the transfer might be made by the other executor *Matthews* alone.

The petition was supported by the affidavit of *John Eyre Coote*, who swore, that, being admitted to the defendant *Ayles*, he informed him that he was come for the purpose of getting him to execute a Power of Attorney for the transfer of stock belonging to the plaintiff:—that *Ayles* at first replied that he could not write; but, on being solicited more urgently, said, "I won't do any thing," or to that effect:—that he repeated this declaration several times:—and that he likewise said peremptorily, "I won't sign any thing," or to that effect.

The doubt was, whether, regard being had to *Ayles*'s state of mind, such answers amounted to a refusal within the meaning of the act.

(*a*) This act has been since repealed by the 6 Geo. 4. c. 74: the 7th section of which provides for the case of a trustee refusing to transfer, or to receive and pay over the dividends.

In consequence of the power given by the 4th and 6th sections of that act to the *Lord Chancellor*, *Lord Keeper*, or *Commissioners of the Great Seal*, to appoint a person to convey or transfer property standing in the name of a trustee who is of unsound mind, though not found by inquisition to be so; the difficulty, with which the Court had to struggle in *West* v. *Ayles*, and *Simms* v. *Naylor*, can scarcely occur hereafter.

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Mr. *Moore*, for the petition, cited *Simms* v. *Naylor*, (*a*) as an express authority for the application.

Upon the authority of that case, the *Master of the Rolls* made the order according to the prayer of the petition.

(*a*) 4 Vesey Jun. 360.

Nov. 8. 10.

In a suit against a purchaser for specific performance, where a receiver had been appointed and was in possession of the estate, and the Master's report in favour of the title, except as to a very small part of the estate for which the purchaser was entitled to an abatement, had been confirmed, and followed by an order, by which, after referring it to the Master to ascertain what abatement the purchaser was entitled to, and to compute interest upon the remainder of the purchase-money, and to settle the conveyances, it was ordered, that upon the execution of the conveyances and delivery thereof and of the title-deeds to the purchaser, he should pay to the plaintiffs the remainder of the purchase-money, after deducting the abatement, with the interest to be computed by the Master, and that the Receiver should thereupon deliver up to him possession of the estate, the Court refused to discharge a writ of *Ne exeat regno* issued against the purchaser, and marked for the full amount of the purchase-money, though the abatement, (which it clearly appeared would be less than the interest) had not been ascertained by the Master, and no steps had been taken towards the execution of the conveyances.

The sheriff having taken the defendant under the writ refused to release him out of custody until the whole sum for which the writ was marked was paid into his hands, and the Court did not disapprove of his conduct.

BOEHM *v.* WOOD.

THIS suit was instituted for the specific performance of an agreement entered into by the defendant to purchase an estate, consisting of a mansion-house and park with an adjoining farm and the tithes of the park and farm lands, for 36,000*l*. The agreement, which was dated the 26th of *July* 1819, stated that the park-lands were exonerated from the land-tax, and it contained a proviso, that if the plaintiffs should not be able to make out a satisfactory title to the tithes of the premises or any part thereof, the defendant should be at liberty to reject

the tithes to which the title was defective, and in that event should be entitled to and should accept an abatement out of the purchase-money. The 29th of *September* 1819 was the period fixed by the agreement for the completion of the purchase.

On the 30th of *May* 1820 the plaintiffs obtained the usual order for a reference to the Master upon the question of title (*a*), and on the 25th of *November* following, pending the enquiry as to the title, a Receiver was appointed (*b*). The Master by his report, dated the 19th of *July* 1822, certified that the plaintiffs could make a good title to the whole estate, except as to the tithes of about twelve acres part of the farm lands, but an exception was taken to the report on the part of the defendant. The exception was argued at the Rolls on the 16th and 17th of *July* 1823, and one of the objections then made to the title was, that the park-lands were not exonerated from the land-tax as stated in the agreement. This objection applied only to fifty-seven acres, part of the park-lands, which had been allotted under an inclosure act in respect of rights of common appurtenant to other lands of which the land-tax had been previously redeemed, and it appeared from the evidence laid before the Master that no charge had ever been made on account of land-tax for the fifty-seven acres in question.

Mr. *Shadwell* and Mr. *Simpkinson* were heard upon the objection for the defendant, and

Mr. *Sugden* Mr. *Preston* and Mr. *Garratt* for the plaintiffs.

In answer to the objection it was argued that the re-

(*a*) 1 Jac. & Walk. 419. (*b*) 2 *Ibid.* 236.

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demption of the land-tax upon the original estate cleared the allotment, and

Where lands are allotted under an inclosure act in respect of rights of common appurtenant to other lands of which the land-tax has been redeemed, the land-tax does not attach upon the allotment.

The MASTER OF THE ROLLS (*a*) declared himself of that opinion, and overruled the objection, observing that when a party redeemed the land-tax he redeemed it for the land and the right of common, and that if when the right of common was set out the land-tax attached upon the allotment the party would be paying double. The defendant having failed in substantiating any of his objections to the title the exception was ultimately overruled, and the report having been confirmed, a motion was made before *The Vice Chancellor*, on the part of the plaintiffs, that the defendant might be ordered to pay his purchase-money into court, that it might be referred to the Master to enquire what abatement ought to be made in respect of the tithes mentioned in the report, and that the Master might be directed to compute interest on the purchase-money after deducting the abatement from the 29th of *September* 1819.

Upon the hearing of this motion, on the 25th of *July* 1823, an order was made that it should be referred to the Master to enquire what abatement ought to be allowed to the defendant out of the purchase-money in respect of the tithes mentioned in the report, and that the Master should deduct from the purchase-money the abatement which he should find ought to be allowed in respect of the said tithes, and should compute interest on the remainder of the purchase-money (after deducting the abatement) from the 29th of *September* 1822, down to the time when the conveyances of the estate should be executed to the defendant; that the receiver should pass his accounts, and should pay to or receive from the plaintiffs what should

(*a*) Sir *Thomas Plumer*.

be found due in respect of his receivership down to the 29th of *September* 1822, and should pay to or receive from the defendant what should be found due in respect of his receivership from the 29th of *September* 1822 to the time when he should deliver up possession of the estate as thereinafter directed; that all proper parties should join in and execute proper conveyances of the estate to the defendant, or as he should direct, and that the conveyances should be settled by the Master in case the parties should differ about the same; that upon the execution of the conveyances and delivery thereof to the defendant, together with such title-deeds documents and papers of or relating to the estate as the defendant was entitled to require, the defendant should pay to the plaintiffs the remainder of the purchase-money, after such deduction as aforesaid, with such interest thereon as should be computed by the Master, and that upon such payment being made the Receiver should deliver up possession of the estate to the defendant.

In pursuance of this order the Receiver's accounts were left in the Master's office, and an estimate was made on the part of the plaintiffs by which it appeared that the tithes to which a good title had not been made were of the value of 29*l.* only. On the 18th of *September* 1823, before any further proceedings were had under the order, the defendant, who was an officer in the service of the East India Company, addressed a letter to the Directors of that Company soliciting permission to return to India on his private affairs, and in consequence of that letter the plaintiffs applied by petition to the *Master of the Rolls* for a writ of *Ne exeat regno* to restrain the defendant from leaving the kingdom. The petition was supported by an affidavit of one of the plaintiffs, stating, that the deponent had lately discovered and believed the fact to be that the defendant was about to depart immediately from this country and to proceed to India, that the purchase-money

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would be in danger of being lost to the plaintiffs thereby, and that the object of the defendant in leaving the kingdom was, as the deponent believed, to avoid performing the contract and carrying the order of the 25th of *July* 1823 into execution, and that the defendant had not taken any steps towards performing the said contract or executing the said order.

Upon the hearing of this petition, on the 4th of *October* 1823, *The Master of the Rolls* ordered that a writ of *Ne exeat regno* should issue against the defendant and should be marked for security in 36,000*l.*, and the writ having issued accordingly the defendant was arrested upon it. After he had been taken into custody the defendant tendered to the sheriff, as a security for his answering the exigency of the writ, the bond of himself and two sureties in the sum of 36,000*l.*, and a deposit of that sum in the Bank of England in the joint names of the sheriff and the sureties. The sheriff however declined to accept the security tendered, and though in the first instance he had proposed to release the defendant out of custody upon his finding four sureties, in the sum of 36,000*l.* each, that he would not go or attempt to go beyond the seas without the leave of the Court, he ultimately insisted that the 36,000*l.* should be paid into his hands before the defendant was discharged.

The defendant then presented a petition to the *Master of the Rolls*, praying, that his Honor's order of the 4th of *October* 1823, and the writ of *Ne exeat regno* issued in pursuance thereof might be discharged. By his affidavit in support of this petition the defendant stated, that he had not yet received any answer to his application to the Court of Directors for leave to return to India, that there was nothing whatever of secrecy or concealment nor any intention of secrecy or concealment in his said application, or in his desire and intention to return to

Bengal; and that if the leave asked for should be granted further time must elapse, in the usual course of proceeding in such matters, before he could proceed to the East Indies, and he must state to the Court of Directors the name of the ship in which he was to go passenger and obtain an order to be received on board such ship. The defendant further stated, by his affidavit, that he never in any manner contemplated a departure from this country for the purpose or with a view to avoid performing his said contract, and he denied that the purchase-money contracted to be paid by him for the estate in question would, by reason of his returning to the East Indies, be in any danger whatever of being lost, he the defendant having ample means both in this country and in the East Indies to enable him to pay such purchase-money.

The MASTER OF THE ROLLS having refused to make any order on the last mentioned petition, the defendant paid the 36,000*l.* into the hands of the sheriff, and was thereupon discharged out of custody.

A motion was now made before the *Lord Chancellor*, on the part of the defendant, by which, in addition to the relief sought by the petition to the *Master of the Rolls*, it was prayed, that the sheriff might be ordered to pay back to the defendant the 36,000*l.* paid to him under or by virtue of the aforesaid writ.

Mr. *Wetherell*, Mr. *Shadwell*, and Mr. *Simpkinson*, in support of the motion.

To induce the Court to grant the writ of *Ne exeat regno* there must be an equitable debt actually due from the party against whom the writ is demanded, and, though it is not necessary to aver that the party is going abroad for the purpose of avoiding the payment of the debt, the

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intention to go abroad and danger of losing the debt arising from the absence of the party must always be brought forward. *De Carriere* v. *De Calonne* (*a*). *Cock* v. *Ravie* (*b*). *Etches* v. *Lance* (*c*). *Tomlinson* v. *Harrison* (*d*). There is no debt now due from the defendant. There has been no final order to pay the purchase-money. A deduction is to be made in respect of the tithes, and the money is to be paid only upon the plaintiffs performing an act which it does not yet appear that they are able to perform. It cannot be contended that because a conveyance may be executed the estate is so far the property of the defendant as to give the plaintiffs an immediate right to the money. The circumstances disclosed by the affidavits are not sufficient to justify the Court in inferring that the debt will be endangered by the defendant's leaving the kingdom. The danger to the debt depends mainly upon the question whether the party going abroad may not leave property here to answer the demand upon which the Court can lay its hands. The case referred to in the note to *Goodwin* v. *Clarke* (*e*) shews the opinion of Lord *Thurlow* that in cases of this description the Court ought to enter into the question whether property may not be left in *England* to pay the debt.

The LORD CHANCELLOR.

Where the writ issues against the purchaser of an estate in a suit for specific performance the circumstance that he may have property to answer the purchase-money is not be regarded. *Semble.*

I think *Dickens* must have misunderstood Lord *Thurlow* in that case, because the writ is granted with analogy to bail at law, and at law you never ask whether a man has property or not, but you make him give bail, leaving it to the bail to enquire whether he has property to indemnify them. Besides, though there may be property to answer a sequestration now, how is the Court to know that there

(*a*) 4 Ves. 577.
(*b*) 6 Ves. 283.
(*c*) 7 Ves. 417.
(*d*) 8 Ves. 32.
(*e*) 2 Dick. 497.

will be property to answer it when the sequestration issues.

For the motion.

It must be recollected that the property sold is a security for the purchase-money. The Court, by its receiver, has the estate in its own hands to make good any loss which the plaintiffs might otherwise sustain by the non-performance of the agreement. The absence of authorities affords a strong argument against the writ being supported. *Goodwin* v. *Clarke* and *Raynes* v. *Wyse* (*a*) are the only cases in which the writ has been granted against purchasers in suits for specific performance. In *Goodwin* v. *Clarke* the writ was marked in a small portion of the purchase-money only; and in *Raynes* v. *Wyse* the general question whether the writ ought to be issued against a purchaser does not appear to have been discussed. The circumstance of the estate being in the possession of the plaintiffs, by their receiver, distinguishes this case from *Raynes* v. *Wyse*, where the purchaser was in possession.

The LORD CHANCELLOR.

It strikes me at present that the writ in *Goodwin* v. *Clarke* ought to have been granted for the whole amount of the purchase-money, or ought not to have been granted at all. There is one great difference between that case and the present. According to the statement of that order there was nothing upon which the Court proceeded but the affidavit of the plaintiff, whereas in the present case the Court has its own proceedings to act upon. The receiver in this case is in possession because the defendant ought to have taken possession and would not do so.

(*a*) 2 Meriv. 472.

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For the motion.

The writ ought not to have been marked in the full amount of the purchase-money, the defendant being entitled to a compensation, and the plaintiffs having the security of the estate and of the defendant's other property. To authorize the issuing of the writ it is not sufficient to impute to a party a future distant intention to go abroad, as such an intention can produce no danger to the debt. It ought to be shewn that the party means to leave the kingdom immediately. No answer has yet been given to the defendant's application for leave to return to *India*, and if such leave should be given considerable time must elapse, according to the custom of the East India Company, before the defendant can regularly leave *England*. There is no rule laid down by which the security to be taken by the sheriff is limited, but his conduct has been oppressive in demanding such excessive bail.

The LORD CHANCELLOR.

I remember a case in which the sheriff having taken bail on a writ of *Ne exeat regno*, and assigned the bail-bond to the plaintiff in the suit in equity, application was made to the Court for leave to sue upon the bond, and Lord *Thurlow* held that he had nothing to do with the bond, and that the only order he could make was upon the sheriff to produce the body of the defendant (*a*). It is therefore with the sheriff to take care that he has the defendant to produce. According to that decision I apprehend that what the sheriff does in the case of a writ of *Ne exeat regno* is upon his own responsibility. What the sheriff has done in this case is to require sufficient security for his having the defendant to produce.

What the sheriff does in the case of a writ of *Ne exeat regno* is upon his own responsibility.

(*a*) Collinridge *v.* Mount, 2 Dick. 688.

Mr. *Hart*, Mr. *Sugden*, and Mr. *Preston*, against the motion.

Where the Court appoints a receiver in cases of this description, the question to which party the possession of the receiver is to be attributed is left open to future determination. In this case the Court has declared the possession of the receiver to have been the possession of the purchaser from the 29th of *September* 1822. From that time therefore the purchaser has been bound to pay the purchase-money and interest. The Court has directed the payment to be made, and there has been nothing to delay it except the defendant not having tendered a conveyance. There can be no doubt therefore that the debt was sufficient to authorize the issuing of the writ. The purchaser being in possession by his receiver this case falls strictly within the authority of *Raynes* v. *Wyse*, which is a positive decision that after it has been shewn that the plaintiff is entitled to a specific performance the writ may issue. In the case before Lord *Thurlow* it did not appear that a good title could be made, and it would therefore have been premature in the Court to have considered the purchaser liable for the purchase-money. There is no case in which it has been required to be shewn that the party is going abroad immediately. Where the intention to go abroad is clear the Court will not measure the time. If the application had been delayed and the defendant had prepared for the voyage, the Court would have refused the writ on that ground alone (*a*). The cases of *Atkinson* v. *Leonard* (*b*) and *Stewart* v. *Graham* (*c*) have established, that for the purpose of obtaining and sustaining this writ it is not necessary to swear that the party is about to leave the kingdom with a view to avoid payment of the debt, but that it is sufficient to prove that the party is about to

(*a*) Dick *v.* Swinton, 1 Ves. & Bea. 371.

(*b*) 3 B. C. C. 218.

(*c*) 19 Ves. 313.

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leave the kingdom, and that the debt will be endangered if he does.

The LORD CHANCELLOR.

Upon the defendant's stating that if the plaintiffs obtained a decree he would leave the kingdom, the writ was issued in an early stage of the cause.

I remember an instance of the writ being issued in an early stage of a cause upon the defendant's stating that if the plaintiffs obtained a decree he would leave the kingdom.

For the plaintiffs.

It does not follow that because the defendant is opulent the debt will not be endangered by his absence. The moment the equitable debtor is about to quit the country without paying the debt, the Court raises an implication that by his going out of the jurisdiction the debt will be in danger of being lost.

Mr. *Wakefield*, for the sheriff.

Mr. *Wetherell* in reply contended, that there was no sufficient equitable debt to be the subject of a writ of *Ne exeat regno*, and remarked, that the case of *Raynes* v. *Wyse* only suggested the question whether the writ had ever issued till it had been shewn that the plaintiff was entitled to a specific performance, and did not decide that it ought then to issue.

The LORD CHANCELLOR.

The question before me is whether this writ ought to be discharged. If it ought never to have been granted it ought now to be discharged. There can be no objection to the writ being discharged if the 36,000*l.* is brought into Court, but if the writ ought not to have been granted there is no pretence for bringing the money into Court.

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It does not appear to me that in determining the present question I have any thing to do with the complaint made as to the conduct of the sheriff. It must be recollected that he is placed in circumstances of great difficulty; that it is upon his own responsibility he is to act. After Lord *Thurlow's* decision that he would put it upon the sheriff to produce the defendant to the Court, the sheriff is not to be blamed if he takes care to have the defendant to produce. This case originally came before *The Master of the Rolls*, who, according to all which is to be found in the books, has as much jurisdiction to direct the writ to issue as the *Lord Chancellor* himself has, though it is by the *Lord Chancellor* that the seal must be put to the writ, and till that has been done, according to the order of the Court, there is nothing which can be denominated a writ. If a serious doubt had arisen in my mind I should have referred the case back to the *Master of the Rolls* before I put the seal to the writ. This writ till a late period of our history was a high prerogative writ which was made use of for the purposes of the State; it was a writ by which the crown was enabled to prevent any of its subjects from leaving this country when their services were required in it. The effects of the writ are as much known to the law at the present moment as they ever have been. Upon what grounds the writ was originally applied to civil purposes, whether upon the principle that no better service could be done to the State than to compel the subjects to do justice to each other, it is difficult now to determine; but, whatever the principle may have been, it is without all question that this Court, if not bound *ex debito justitiæ*, (and I do not say that it is so bound) is bound in the exercise of a sound discretion to grant the writ, if the case be a case in which the writ ought to be granted. There are certain circumstances attending the application for the writ which admit of no dispute. In the first place the debt must be equitable; In the second place it must be due;

The Master of the Rolls has jurisdiction to direct the writ to issue.

The debt for which the writ issues—must be equitable,—must be due,—

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and must be such debt that the sum to be marked upon the writ can be ascertained.

Exception to the rule that the debt must be equitable in the case of account.

The exception founded on the difficulty of proceeding at law in such matters.

In matters of account the party may swear to his belief as to the amount of the balance.

The cases of the writ being issued in suits for specific performance are also founded on the difficulty of proceeding at law.

and in the third place it must be a debt in respect of which the Court can see its way to direct what sum shall be marked upon the writ. To the rule that the debt must be equitable there is one case of exception, the case of account; that exception stands upon this ground, that this Court has jurisdiction in matters of account as well as a court of law, and that the proceedings at law in such matters are attended with very great difficulties. This Court has therefore said, though it be a general rule that the debt shall be equitable, and the affidavit as to the amount positive, yet, in matters of account, that shall be considered as an equitable debt which is also a legal debt, and it shall be sufficient for the party to swear to his belief as to the amount of the balance. I take it that these cases of specific performance must fall under the same rule. When it is considered what must be the averments and what must be the proof at law, it cannot be denied that there are many cases of specific performance in which the debt could not at law be recovered. I will venture to say, that if in matters of account and matters of specific performance the jurisdiction of Courts of Equity was to be destroyed, there would be very many cases in which no remedy at all would be left. The rule that the sum to be marked on the writ must be ascertained has been settled in many cases. In the case of executors for instance it must be shewn to what amount they have received assets, in order that the Court may know for what sum the writ shall be marked. Such being the case with respect to the writ of *Ne exeat regno*, the principles of the Court require a pledge to be given to the fact that the party is going abroad, and that the debt will be endangered if he does. I am not aware of any case which has determined that it must be sworn that the party is going abroad immediately; that is a circumstance to be considered in the exercise of the sound discretion which the Court applies to the subject; I do not take it that it need be sworn that the party is going abroad for the

The rule that the sum to be marked upon the writ must be ascertained instanced in the case of executors.

Upon the application for the writ it need not be sworn that

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purpose of avoiding the payment of the debt; if it can be collected that it is the intention of the party to go abroad before the debt can be got out of his hands, it is a case, in which, in the exercise of a sound discretion, the writ ought to issue. *Goodwin* v. *Clarke* does not at all apply to this case; that was a case in which all that had passed as to the acceptance of the title rested entirely upon the affidavit of the plaintiff in the cause, and, to render that case in the least degree applicable to the present, it must be shewn that every thing had taken place there before the filing of the bill which has taken place in this cause since the bill was filed; with all deference to Lord *Apsley* that case cannot have been rightly decided; the Court was bound to grant that writ for the full amount of the purchase money, or it had no right to grant it at all. Whether the writ ought to be granted merely upon the footing of contract I shall not say one single word, this is not a mere case of contract. I need not state that the contract alone (if it could ultimately be carried into execution) made the estate the property of the defendant, so that he might devise it or do any thing with it which the equitable owner of the estate could do, with this difference only, that the estate in his hands was subject to a lien for the purchase money. I do not consider the distinction pointed out in the case before Lord *Thurlow*, because this is not a case which falls within the reach of Lord *Thurlow's* objection, unless it falls within the reach of that part of the objection which hints at the purchaser's having other property; this is a case in which the title has been approved and an order has been made by the Court consequent upon the approbation of the title; that order adverts to the circumstance of a receiver having been appointed in the progress of the cause; I take it to be clear that if the defendant is to take the estate the receiver must be considered as his receiver, and the possession of the receiver as his possession.

The case of *Goodwin* v. *Clarke* was not rightly decided.

Whether the writ ought to be granted merely upon the footing of contract. *Qu.*

Where a receiver is appointed in a suit for specific performance, if the purchaser is compelled to take the title the receiver is to be considered as his receiver.

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When I put the seal to this writ it did not escape my attention that there was an allowance to be made for the tithes of a small portion of the estate, but I satisfied myself that it was impossible to say that less than 36,000*l.* could be due as money to be paid for the property by the purchaser, who was fixed with the obligation to take it by the title being made good; it did not either escape my attention that there was in this case a security in the nature of a lien upon the estate. It happened that I knew the estate to be an estate rather for pleasure than for profit, but that did not govern my mind upon the question whether I should judicially give more or less; I came to the determination that the writ ought to be marked for the full amount of the purchase money because, considering equitable bail with reference to legal bail, I thought, and I believe I am not wrong, that if instead of the purchaser's tendering a conveyance the vendor had tendered it and had called upon the purchaser to pay the money and he had refused to do so, and the vendor had brought an action, the purchaser might have been held to bail at law for the whole debt, and it could not have been said that the vendor should not have bail for the whole debt because he had a lien in equity. I also reasoned the case thus; the vendors have got the estate, but that is not what they wish to retain, and how are they to proceed to a sale of the estate if the defendant goes abroad whilst there is a decree in this Court that the estate is his in equity; how is that equitable title to be got out of him? It appeared to me that the difficulty attending a re-sale was such, that even if there had been an analogy to be derived from legal bail in favour of the defendant, it could not have applied under the difficulties which would have presented themselves in this Court. When I put the seal to the writ I was of opinion that the debt was an equitable debt for which the writ might issue, and I did not forget to consider whether the debt was due; that the debt was due

The vendor's equitable lien upon the estate not to be regarded in issuing the writ against a purchaser in a suit for specific performance.

appeared to me to be the clear result of the *Vice Chancellor's* order, because that order in effect declares, that such as the rights of the parties are thereby declared to be, such were the rights of the parties at the time of the bill being filed. Whether the Court has done right or wrong in all its doctrines about specific performance is a question with which a Judge in this Court dare not deal. If those doctrines are to be altered, they must be altered by the House of Lords.

Another question in this case is whether the affidavit is sufficient; it does not appear to be denied that it was sufficient to authorise the writ being granted; I do not say that it is therefore sufficient to sustain the writ, but I am ready to say I am not convinced that any such explanation has been given as to call upon the Court to say that with such explanation the writ ought to be discharged. That the defendant meant to go abroad if the *East India Company* gave him leave there can be no doubt, and I cannot satisfy myself that in giving leave to persons to go abroad the *East India Company* do not so act, as that the defendant might have had an opportunity to go before we met again in this Court. It is not stated that any arrangement has been made to pay or any property devoted to the payment of this debt.

With respect to the difficulty as to the sum to be marked upon the writ, looking at the proceedings in this cause I should have had no difficulty, if the motion made before the *Vice Chancellor* had been made before me, in ordering the defendant to pay the 36,000*l.* into Court; I do not therefore say that the writ ought to have issued, but I say that all uncertainty as to the sum to be marked upon it is quite done away with by that circumstance. Upon these grounds it appears to me, that, taking the circumstances of this case as I find them upon this record,

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without laying down any general rule, there have not been laid before me sufficient grounds for discharging this writ.

ROLLS.

Nov. 11.

ATTORNEY-GENERAL *v.* GODDARD.

A testator, after giving a legacy in trust for a charitable purpose, says, "As money is of more uncertain value than land, I do also give them (the trustees) power to make such purchase as they shall think best for perpetuating the gift:" Held, that these words do not bring the legacy within the mortmain act.

A testatrix gives a legacy in trust for the minister of a chapel, but directs that, upon a specified contingency, the legacy is to go to the trustees of a certain college; the interest is paid during many years to the minister of the chapel: Held, that the charity for the chapel may be established upon a bill and information to which the trustees of the college are not parties.

MARTHA PYLE, by her will dated the 8th of *April*, 1783, bequeathed as follows: "I give unto the Rev. Dr. *Bolton Simpson* and the Rev. *James Talman*, together with the Vicar of *Christ-Church-Twynham*, and to their heirs and successors, 1000*l.* which I have now in India annuities, in trust for the benefit of the minister that shall or may be appointed and constantly do weekly duty at the chapel lately built for the tithing of *Hinton:* (that is to say) if divine service is performed weekly in the said chapel within the space of two years from my death, then my will and desire is that these my trustees to this part of my will do pay the interest arising from the 1000*l.* India annuities yearly from the time of divine service being so performed, unto the minister who shall be appointed and do the duty, &c. but until such time as service is regularly and weekly performed, the money arising by way of interest on the said sum of 1000*l.* India annuities I give to be distributed equally every half year among the clergymen's widows belonging to the college near *Close-gate* in the *Close* of the city of *New Sarum* for the time being: and if the chapel is *not* actually consecrated and in constant use for divine service within three years at farthest after my decease, then my will and desire is that the money here given should continue the

interest arising therefrom for ever unto the widows of the said college &c.; and in such case of the chapel not being in constant use for divine service in three years from my death, &c. (*a*)—I would be glad to have the same gentlemen, who are trustees for the estate of the said college, take upon them to be trustees for this 1000*l.* India annuities: Lastly, as money is of more uncertain value than land, I do also give them power to make such purchase as they shall think best for perpetuating the gift."

The testatrix died in 1784. Her executor *Gale*, up to the time of his death in 1800, paid the dividends of the legacy to the minister of *Hinton* chapel. *Gale*'s widow and executrix applied them in the same way: but, after-her death, *Goddard*, her executor, refused to make any payments without the direction of the Court. In consequence of his refusal, the *Attorney-General* and *Thomas Wyndham*, the officiating minister of *Hinton* chapel, filed the present information and bill; alleging, in addition to the facts already stated, that, before the expiration of the term fixed by the will of the testatrix, the chapel was consecrated, a minister appointed to it, and divine service performed therein regularly every week, and therefore praying that the charitable bequest in trust for the minister of the chapel might be established, that the dividends of the legacy might be decreed to be paid to him, and that proper persons might be appointed to be trustees of the fund along with the Vicar of *Christ-Church-Twynham*.

Dr. *B. Simpson* and Mr. *Talman* had long been dead. The only defendants were the vicar of *Christ-Church* and *Goddard*, the personal representative of the original tes-

(*a*) In this part of the will, as recited in the brief, there occurred some confused and ungrammatical expressions, amounting to a direction to the trustees for the chapel to relinquish the trust, in the event of the chapel not being in constant use within three years from the death of the testatrix.

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tatrix; both of whom admitted by their answers, that they believed that divine service had been regularly performed in *Hinton* chapel as alleged in the bill.

No evidence was gone into.

The cause came on as a short cause before the long vacation; when it was ordered to stand over, in consequence of a doubt which the *Master of the Rolls* expressed, whether the last clause of the bequest, "Lastly, as money, &c." did not bring the gift within the mortmain acts.

Mr. *Moore* appeared for the executor *Goddard*.

Mr. *Merivale* and Mr. *Pemberton*, for the other parties, supported the prayer of the bill and information. Relying on the cases cited in Roper on Legacies,(*a*) they took the distinction between a direction to trustees to invest money in land, and a discretionary power given them to do so; and they argued, that such a discretionary power did not bring a legacy within the mortmain acts.

The MASTER OF THE ROLLS,

Admitting the distinction, said, that the doubt was, whether the clause in the will did not amount to a direction to the trustees to purchase land as the more permanent security, and whether the discretion given them extended to anything further than the selection of such an estate as would constitute an advantageous investment of the money. Upon the whole, however, considering the leaning of the Court in favour of charities, he was of opinion that the present bequest ought to be sustained; especially as the clause, on which the doubt arose, seemed to relate to an event which had not occurred,—the event of the chapel not being in use for divine service within three years after the death of the testatrix.

(*a*) 2 *Roper on Legacies*, 86.

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Another difficulty suggested by Mr. *Moore* on the part of the executor, but not insisted upon, was,—that the necessary parties were not before the Court. If the chapel was not consecrated and in constant use for divine service within three years from the death of the testatrix, the legacy was given over to the trustees of the college of clergymen's widows at *Salisbury*. These trustees ought to be before the Court, in order to assert any interest which they might have, and raise the question, whether the contingency, which was to give them an interest, had or had not happened. To establish the charity for *Hinton* chapel was to declare, that the gift to the college of clergymen's widows did not take effect. How could the Court make such a decree, when no person was present to sustain the rights of the college?

The only answer made to this objection was,—that, in fact, the contingency, on which the gift to the clergymen's widows arose, had not happened; and that, after the payment of the dividends during so many years by *Gale* and his executrix to the minister of *Hinton* chapel, without any claim being advanced by the trustees of the college, it was unnecessary to bring them before the Court.(*a*)

The *Master of the Rolls* thought, that, under the circumstances of the case, the charity for *Hinton* chapel

(*a*) The objection was,—not, that the contingency, which gave an interest to the trustees of the college, had happened, but, that no evidence was given that it had not happened, and that the question whether it had or had not happened, could not be determined in the absence of the trustees.

Besides, even if the right of the minister of *Hinton* chapel was established, the trustees of the college had an interest in ascertaining the precise date when service began to be performed regularly in *Hinton* chapel: for the college was entitled to the dividends during any interval that might have elapsed between the death of the testatrix and the time when the chapel began to be in regular use.

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might be established in the absence of the trustees of the college.

The decree was made accordingly, without any reference to the Master to inquire whether the chapel had been consecrated and in regular use for divine service within the time prescribed by the will of the testatrix The only reference was, to appoint proper trustees.

ROLLS.

Nov. 11.

VERLANDER *v.* CODD.

The person entitled to the reversion in fee of a house, expectant upon a term vested in a lessee who has demised the premises for a portion of his term to a sub-lessee, agrees by one letter to grant that sub-lessee *an extension of lease* at a certain yearly rent, and, in another letter, fixes the time, when the term, which he thus proposes to grant, is to expire; this is a valid agreement within the statute of Frauds, and, under it, the sub-lessee, has a right to a lease which shall commence from the expiration of the existing term.

GEORGE AINGE and *William Ainge*, being possessed as the executors of *Ann Hovell*, of a leasehold messuage for a term which was to expire at *Michaelmas* 1826, at a reserved rent of 36*l.* a-year, demised it, by indenture dated the 10th *November* 1818, at a yearly rent of 50*l.*, to *Jacob Alexander Verlander*, for a term of seven years and three quarters, wanting ten days, to commence from the 5th of *December* 1818. In the same month of *November*, a treaty was commenced between *Verlander* and *Philip Codd*, who, in 1814, had purchased the fee-simple of the house, subject to the term of the *Ainges*, for a new lease of the premises, and also for a lease of an adjoining larger house. In the course of this negotiation, *Codd*, on the 28th of *November* 1818, wrote the following letter to *Verlander*:

"I have received an offer for the large house on the Terrace so much more to my advantage than that you made me, that I have closed therewith. I will, however, grant you the extension of lease you solicit on the small

one, on your entering into regular arrangements for paying me 50*l.* a-year for the same.

"P. CODD."

After this, *Verlander* let the house, and some money was expended by the new tenant in putting it into repair. Towards the end of *July* 1819, *Verlander* informed *Codd*, that he should give his solicitor directions to prepare a lease: in consequence of which notification *Codd*, on the 2d of *August*, wrote and signed a letter, addressed to *Verlander*, containing the following passage:

"As I know my own solicitors Messrs. *Still*, *Strong*, and *Rackham*, to be friendly, very reasonable, and correct, I shall feel more gratified, if they have the drawing out of the lease which I am now to grant to you for such term of years as to cause the expiring of it to cease, on the day on which that does, which I granted to Mr. *Cullingham*."

The lease to Mr. *Cullingham*, mentioned here, was a lease of the adjoining house, and would expire at *Midsummer*, 1840.

In compliance with *Codd*'s request, *Verlander* carried the two letters and his own lease from the *Ainges*, to Messrs. *Still*, *Strong*, and *Rackham*, as instructions for preparing the new indenture of demise: and they, without having received any further instructions from, or having had any subsequent communication with, their client, prepared a lease and counterpart, which purported to demise the premises to *Verlander* for a term of fourteen years from the 24th of *June* 1826, at a yearly rent of 50*l.* On the 9th of *August*, they requested him to meet Mr. *Codd* at their chambers on the 11th, for the purpose of having the lease and counterpart executed. Accordingly, *Verlander* went to their chambers at the appointed time, and,

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in their presence, executed the counterpart. *Codd* did not attend: and, when afterwards called upon to execute the lease, refused to do so, on the ground, that the only agreement, which he had made, was, to grant a lease ending at *Midsummer* 1840, and yielding to him a yearly rent of 50*l.* from *Midsummer* 1819.

The bill was filed by *Verlander* against *Codd* for a specific performance of the contract. It prayed in the alternative, either the defendant might execute and deliver the lease prepared by Messrs. *Still*, *Strong*, and *Rackham*;—or, if it should appear to the Court, that the true meaning of the agreement was, that the defendant should receive a rent of 50*l.* for the premises instead of the original rent of 36*l.* a-year, then that the agreement might be specifically performed according to that construction.

The defendant by his answer insisted on the benefit of the statute of Frauds; and contended, that, if there was a valid agreement in writing, the true meaning of it was, that the subsisting lease should be surrendered, and that the plaintiff should have a lease from *Midsummer* 1819 to *Midsummer* 1840 at a yearly rent of 50*l.*

Mr. *Horne* and Mr. *Wakefield*, for the plaintiff.

Mr. *Shadwell* and Mr. *Bligh*, for the defendant.

It is not enough that one party understood the contract in a particular sense: the contract is the understanding and agreement of both parties; and that agreement must be found expressed with sufficient certainty in writing signed by the defendant. The plaintiff relies on the words "I will grant you the extension of lease you solicit:" but these are too indefinite to be enforced by a court of equity. What was the proposed extension? what lease was it, which was thus to be extended? What was

the subject of this lease and extension? To fix these points it would be necessary to have recourse to parole evidence. The letter of the 2d of *August* may shew by reference when the proposed extension was to cease: but the date, from which it was to commence, is left altogether uncertain: so that the agreement is defective in that particular which is the most essential of all.

As to the real intention of the defendant, there can scarcely be a doubt. It is not likely, that he should bind himself, without deriving any present benefit from the transaction, to grant a reversionary lease of his property, to take effect after a lapse of eight years.

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In *November* 1818, when the transaction in question took place, *Verlander* was in possession of the house, at a rent of 50*l.* a-year, under a demise from the Messrs. *Ainge*, who, as the personal representatives of *Ann Novell*, were themselves lessees of it at a yearly rent of 36*l.*, and had a remnant of the original term still vested in them. It is not pretended, that any thing was done or said, to alter or put an end to either the contract between them and the reversioner, or the contract between them and their sub-lessee: and, therefore, the new contract between *Verlander* and *Codd* must have been one that was to be consistent with the distinct and independent contract subsisting with the *Ainges*. Their interest could not be affected, unless by dealings to which they were parties. There was no communication with them upon the subject. As *Codd* had purchased the reversion only four years previously, and in the interval had received the rent from the *Ainges*, he must have known that they were his tenants—that, during the continuance of their term, he was entitled to no more than 36*l.* a-year—and that *Ver-*

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lander had no right or power to give up a lease which was not his. How, then, is it possible to believe the defence which is set up—namely, that there was either a mutual understanding, or a positive agreement, that the lease of the *Ainges* should be surrendered?

Under these circumstances and with a full knowledge of the relative situation of the *Ainges*, of *Verlander*, and of himself, *Codd* writes the letters of the 28th of *November* 1818 and the 2d of *August* 1819. "I will grant you," says he in the former, "the extension of lease on the small house on your entering into regular arrangements for paying me 50*l.* a-year for the same." Could *Verlander* have solicited, could *Codd* have effectually granted any thing, which was inconsistent with the contract subsisting with the *Ainges*? The phrase "*extension of lease*," used by a person who knew the actual situation of the property and the interests of the different parties in it, is quite free from ambiguity. It must refer to the end of the term granted by the subsisting lease. The word "*extension*" implies *ex vi termini* the continuance of the lease and negatives the destruction of it: it denotes—not that the lease is to be surrendered, but that something is to be added to it.

On the 2d of *August* 1819, the second letter is written; and it is scarcely to be supposed, that, during the whole of the period that had elapsed from the 28th of the preceding *November*, the parties had failed to understand each other. That letter fixes the termination of the new lease: it *is* to expire at *Midsummer* 1840. But its commencement, says the defendant, is left uncertain. In no respect: for the former letter had stated, that the new lease was to be an extension of the existing lease; and the existing lease expired in 1826. The defendant, therefore, had agreed to grant to the plaintiff a lease, which should entitle him to

the possession of the house from the expiration of the term vested in the *Ainges* until *Midsummer* 1826, at a yearly rent of 50*l.*

It has been contended, that it is extremely improbable, that *Codd* should have meant, without any present benefit, to grant a reversionary lease, commencing at the end of eight years. That depends entirely on the notions which he entertained with respect to the likelihood of property of this description rising or falling in the mean time. To secure a rent of 50*l.* a-year from 1826 to 1840, might be, and might by him be conceived to be, very advantageous.

It has been determined, that one written paper, which is signed, may refer to another which is not signed. (*a*) Here all the essential terms of the contract are contained in the two letters signed by the defendant, explained by the lease to which they refer. The plaintiff is, therefore, entitled to a decree for specific performance, with costs.

The decree was "that the defendant do execute the lease prepared by the defendant's solicitors, Messrs. *Still*, *Strong*, and *Rackham*, in the pleadings mentioned, and do pay unto the plaintiff his costs of this suit."—Reg. Lib. 1823, B. 107—108.

(*a*) 9 Ves. jun. 250; 1 Scho. & Lef. 22. Tawney *v.* Crowther, 3 Bro. C. C. 161, 318.

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DINES *v.* SCOTT.

July 23.

Nov. 13.

Where a sum of money came to the hands of one of two executors, who paid it over to the other executor, it was held that the executor who first received it could not, under the usual decree for an account, examine the other executor as a witness to prove that the money paid over was duly applied on account of the affairs of the testator, and an order obtained for that purpose was discharged.

BY the decree made on the hearing of this cause, dated the 15th of *May* 1821, it was amongst other things ordered, that it should be referred to the Master to take an account of the personal estate of *John Wintersgill Piercy*, the testator in the pleadings named, come to the hands of his executors, *John Corderoy* deceased, and the defendant *Mary Scott*, and it was ordered, that what upon taking the said accounts should be found due from the said *John Corderoy* should be answered by the defendants, *James*, *Stanbank*, and *Green*, his executors, out of his assets.

In the progress of the cause in the Master's office the defendants *James Stanbank* and *Green*, having been charged with moneys received by *Corderoy* on account of the estate of *Piercy*, carried in their discharge, by which, amongst other payments, they claimed to be allowed several sums of money alleged to have been advanced by *Corderoy* to the defendant *Mary Scott*, for the purpose of enabling her to discharge debts due from the estate of *Piercy*. The plaintiffs having objected to the allowance of these sums unless the due application of them was proved by the production of vouchers, a motion was made before the *Vice Chancellor*, on behalf of the defendants *James Stanbank* and *Green*, that they might be at liberty to examine the defendant *Mary Scott* upon interrogatories before the Master, touching the payments made by her on account of *Piercy's* estate, and the moneys received from her co-executor the late *John Corderoy* for the purpose of making such payments.

The motion was supported by the affidavit of the defendant *Green*, which, after stating that the deponent and his co-executors were unable to produce the vouchers to prove the due application of the sums mentioned in their discharge to have been paid to the defendant *Mary Scott*, and that the defendant *Mary Scott* alleged that those vouchers were delivered up to *Corderoy*, and after further stating that if any such vouchers were so delivered up, the same were, as the deponent believed, after the death of *Corderoy* destroyed by the defendant *James*, who had burnt various papers which he conceived to be useless, went on to state, that the payments in question were taken from an account rendered to the defendant *Mary Scott* by *Corderoy* in his lifetime, (*a*) and that *Mary Scott* would, as the deponent believed, if she was examined, admit that such account was correct, and that she received and applied the money as there stated, and that although twenty years had elapsed since the payments mentioned in the discharge of the deponent and his co-executors were made, they had been enabled, in those instances where the names of the persons had been given in the before-mentioned account, to shew that those persons had actually received the sums alleged to have been paid to them, but that nothing appeared upon the said account with respect to the parties to whom the sums in question were paid, and the deponent and his co-executors were unable to discover the names of such parties.

Upon this affidavit *The Vice Chancellor* made the order, as prayed by the notice of motion, saving all just exceptions.

A motion was now made before the *Lord Chancellor*, on the part of the plaintiffs, to discharge the order.

(*a*) By the decree in the cause it appears that *Mary Scott* was tenant for life of the residue of the testator's estate.

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Mr. *Hart* and Mr. *Barber*, in support of the motion, contended, that the order sought to be discharged was altogether new in practice, and furnished a most dangerous precedent, as it would enable executors in all similar cases to settle disputes between themselves at the expense of their testator's estate.

Mr. *Pemberton*, against the motion, insisted, that the sums in question having been paid to Mrs. *Scott* for the purpose of being applied by her as the agent of *Corderoy*, the Court would permit her to be examined for the purpose of proving the due application of those sums, and that she might have been examined as of course before the decree. He also relied upon the circumstances stated in the affidavit, and particularly the length of time which had elapsed since the payments in question were made.

The LORD CHANCELLOR.

If executors or accounting parties have been led to divest themselves of all accounts, the course of the Court is, not to permit one to examine the other, but to allow the party charged to discharge himself upon his own oath. Where an executor is permitted to discharge himself upon his own oath he cannot discharge himself without discharging his co-executor, because, if he proves the due application of the money by himself, he proves the due application of it against all the world. *Primâ facie* it is much more safe to abide by the rule of the Court, that a proper case being made out the Court will allow an executor to discharge himself upon his own oath, than it is to say that the Court will allow co-executors to be carrying on suits between themselves.

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In this case a sum of money came to the hands of one

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of two executors, and it is alleged that he paid it over to the other executor. The consequence of that allegation is that both became answerable for that sum, and then the question is, whether the one who first received it, being charged with that sum, can examine the other, who is also chargeable with it, as a witness to prove that it was duly applied on account of the affairs of the testator;—whether the examination of one personal representative is to discharge another personal representative, where by that examination the party examined would discharge himself also. This order cannot stand. There have been many cases where, upon the hearing of a cause, the Court has declared that, in the circumstances under which the bill has been filed, it would apply a different rule of proof from that which is ordinarily applied, and I take it also, that upon a proper case laid before it, the Court may do that under other special circumstances, but then there must be a proper case laid before the Court and discussed in the presence of all the parties interested. In this case there is nothing before me to shew that it is out of the power of Mrs. *Scott* to prove the due application of these sums by the individuals to whom they were paid.

Order discharged.

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July 10.
November 12,
14, 15.

PARKER *v.* FAIRLIE.

Upon a bill filed by merchants in *England* against merchants in *India*, for an account of the dealings and transactions between them, one of the defendants, residing in *England*, in answer to an allegation in the bill that some cotton which had been sent by the defendants to the plaintiffs was of inferior quality, said, that he had no personal knowledge of the dealings between the two firms, but that he had received certain affidavits and certificates, which his partners in *India* had caused to be made by experienced persons there, from which he believed the cotton to be of superior quality, and set forth the affidavits and certificates, in a schedule, *in hæc verba*: held that the schedule was not impertinent.

THIS case came before the Court upon a petition of appeal, presented by the plaintiffs, from the decision of His Honor the Vice-Chancellor that the second schedule to the answer of the defendant *Fairlie* was not impertinent. The schedule in question consisted of about thirty folios. The facts of the case are fully stated in the report of the hearing before the Vice-Chancellor, 1 Sim. & Stu. 295.

Mr. *Horne* and Mr. *Palmer* for the appellants contended, that the documents contained in the schedule could never be made use of in evidence, and might have been made part of the answer by simply referring to them; that it was therefore unnecessary and useless to set them forth at length in the answer, and that a statement which was unnecessary and useless must be considered to be impertinent. *Alsager* v. *Johnson*. (*a*) *Norway* v. *Rowe*. (*b*)

Mr. *Shadwell* and Mr. *Grant* for the respondents.

The cases which have been decided do not bear upon the present question; they were determined upon the ground that the length of the statements upon the record was immoderate and oppressive; there is no rule of the Court requiring answers to be framed in the most concise form; a defendant is entitled to state every circumstance

(*a*) 4 Ves. 217. (*b*) 1 Mer. 347.

which verifies and gives weight to his answer, and the documents contained in the schedule materially confirm the statement made by this defendant.

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The LORD CHANCELLOR.

The Court is bound to protect plaintiffs from unnecessary expence, but, while it exercises that providence for the benefit of plaintiffs, it must take care that it does not, as an illiberal view of the subject may do, prevent defendants from stating their cases in such a manner as may be necessary for their defence. I should be very unwilling to press this defendant so far as to say that the schedule in question is to be considered impertinent merely because the matters contained in it would not be evidence. It may become necessary in the result of this case that a commission should go out for the examination of some persons in *India*, and I think therefore the defendant could not have been blamed, if he had said in his answer that he had in his possession certain documents which tended to prove certain matters, and had referred to a schedule containing a catalogue of those documents; but I find it extremely difficult to say that there are not matters contained in this schedule which have no relation at all to the matters in question in the suit, and I also find it difficult to say that the matters contained in the schedule which have relation to the matters in question in the suit are properly set forth.

November 12.

The LORD CHANCELLOR said, that he concurred in opinion with the Vice-Chancellor and the Master that the defendant was justified in referring to the affidavits and certificates as forming the ground of his belief, and as aiding him in crediting and giving weight to that belief, and observed that the Vice-Chancellor's judgment introduced a question of considerable importance, whether a statement, which is not necessary, but still is relevant, is

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within the intent and meaning of the Court impertinent, that is to say, whether if a man says more than is necessary for him to say but not a word more than is relevant, so much as is not necessary is to be deemed impertinent. His Lordship then made the following observations. If the defendant in the body of his answer had referred to these affidavits and certificates, leaving them in the hands of his clerk in Court to be inspected by the plaintiffs in case they should think proper to inspect them, or leaving them to be called for by the Court in case the Court should think proper to call for them, it is quite clear that the answer would have been sufficient. The defendant however has not referred to the affidavits and certificates as capable of being seen in the hands of his clerk in Court, or as capable of being called for by the Court, but has stated the affidavits and certificates themselves, and His Honor the Vice-Chancellor is of opinion that this is not useless, that the credit which is due to the answer depends upon the circumstances stated in the affidavits and certificates, and that the defendant therefore has a right to make the affidavits and certificates themselves, so evidencing the truth of his answer, part of his answer; I apprehend that according to the practice of the Court, if the affidavits and certificates had been referred to in proper terms they would in truth, by virtue of that reference, have been part of the answer, and that as part of the answer the plaintiffs might have compelled the production of them, and the defendant would have had a right to have them produced. This case therefore brings the question fairly before the Court whether the term impertin*ent* can be applied to that which is relevant but which is not necessary to be set forth. There have I believe been some cases in which the Court has held it to be impertinent, where accounts of personal estate have been required, to set forth all the particular articles of which the personal estate was composed, and where accounts of receipts and payments have been required, to set forth the different items

and the different particulars of the sums which formed the aggregate amount of the account demanded; (*c*) yet it cannot be denied that the answers in those cases were in a sense relevant, and it must therefore have been the non-necessity of entering into particulars which induced the Court to determine that the answers were impertinent. I think the Court would have taken a better course if it had said originally this is not impertinent but because it is useless the defendant shall pay all the costs attending it.

November 14. The LORD CHANCELLOR said he believed it would be found impossible to hold that the answer in this case was not impertinent without running foul of some decisions to the contrary.

The LORD CHANCELLOR.

November 15. There is one view of this case which has struck me as very material; in a court of equity a plaintiff reads as much of the answer of a defendant as he thinks proper; but suppose a case in which a plaintiff may come into equity and the defendant may turn plaintiff at law, or in which a plaintiff in equity may dismiss his own bill and himself become plaintiff at law; if the defendant's answer is to be made use of at law must not the whole be read? Is it not therefore a very material consideration whether, although it was not absolutely necessary for the defendant to set out these affidavits and certificates, and he might if he had thought proper have referred to them, he had not a right to put them upon his answer if he thought fit to do so, because, if the answer should be made use of against him in a court of law, it might be impossible for him to make use of the affidavits and certificates unless

(*c*) *Beaumont* v. *Beaumont*, 5 Madd. Rep. 51. *Norway* v. *Rowe*, 1 Mer. 347.

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they were set out. This particular reason leads me to think that in this case the answer is not impertinent.

The counsel for the appellants then suggested that the defendant would have been entitled to read the documents at law if he had merely referred to them, and again adverted to the objection that the documents could not be made use of in evidence; but the *Lord Chancellor* said, that the defendant, in order to read the documents at law, must not only have referred to them in the answer but must be quite sure that they would be safely kept, and that if the documents were in the answer he apprehended that they must be read at law, subject to the observation of the Court as to the weight which was due to them; that the Vice-Chancellor's judgment must be affirmed without prejudice to any question as to costs, and that the application for costs could only be made at the hearing of the cause.

Appeal dismissed.

AT THE ROLLS.
Nov. 13, 17.

PARKEN *v.* WHITBY.

WHITBY *v.* PARKEN.

If, in the course of proceedings in a suit for specific performance, there comes out a fact, not put in issue in the cause by either party, which affects the legality of the contract, or tends to shew that the contract is not fully stated in the bill, the Court will direct an inquiry into the fact so disclosed.

Specific performance will not be decreed of an agreement to sell certain property at a price to be settled by two persons who are named, if the Court sees reason to believe, that the price, subsequently fixed by these persons, is considerably below the real value of the property.

A person, who admits that he conceives himself bound in honour, though not legally bound, to contribute to the expenses of a party in a suit, is a competent witness for that party.

ON the 2d of *February*, 1816, *Whitby* signed an agreement to sell all his lands to *Parken*, at a price

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to be fixed by two indifferent persons. Shortly afterwards, *Parken* named one *Franklin* to act in the proposed valuation on his behalf; and *Whitby*, at the recommendation of *Parken's* solicitor, appointed *Olley* to be his valuer.

The agreement of the 2d of *February* not having been carried into execution, another agreement was signed, dated the 20th of *February*, 1817, by which *Whitby* contracted to assign and convey to *Parken* all his lands, farming stock, furniture, china, books, &c. for such price or prices as the same should be valued at by *Olley* and *Franklin*. These gentlemen on the same day fixed the price of all the articles included in the contract at 1,364*l.* 14*s.*

By the original bill *Parken* prayed a specific performance of the agreements of the 2d of *February*, 1816, and the 20th of *February*, 1817. *Whitby*, by his answer, and also by a cross-bill, insisted, that the valuation had been made unfairly, and that the agreements having been obtained by fraud, ought to be declared void.

Mr. *Shadwell* and Mr. *Roupell* were for the plaintiff in the original suit, and defendant in the cross-suit:

Mr. *Sugden* and Mr. *Roots* were for the defendant in the original suit, and plaintiff in the cross-suit.

The agreement was clearly proved: and the defendant endeavoured to protect himself from the performance of it by shewing that the transaction presented many features, which, to say the least, were of a highly suspicious character. The points on which he principally relied, were these two:

First, *Parken*, in his answer to the cross-bill, set forth an account, which his solicitor, in *August* 1817, had deli-

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vered on his behalf to *Whitby*. It contained the following items :

By amount of valuation on purchase of remainder of *Whitby's* estate and goods	1364	14
Deduct for goods abstracted and retained by Mr. *Whitby* from the property comprised in the abovementioned valuation	79	2

Burleigh, *Parken's* solicitor, was examined in the cross-suit as a witness for *Parken* : and, in reply to the last and general interrogatory, he stated, that, when he was instructed to prepare the contract and to comprise in it all the household furniture, plate, linen, china, and books of *Whitby*, it was verbally agreed by the parties, that *Parken* should not take the household furniture, &c. unless *Whitby* should be convicted on some informations under the game laws, which were then in prosecution against him—that *Whitby* was not convicted on these informations—and that, for that reason, the household furniture, plate, linen, china, and books had been retained by him.

From these circumstances, said the defendant in the original suit, it was evident that the written agreement did not express the real contract between the parties, but was in fact intended to be a fraud upon the game laws. The written agreement not being the true agreement, it could not be executed *in toto* : neither could it be executed in part ; for the valuation was a gross sum of 1,364*l.* 14*s.*, which could not now be apportioned among the different items included in the estimate.

Secondly, There was strong evidence, that the price fixed by *Franklin* and *Olley* was far below the real value of the

property. They had estimated the land at about 29*l.* per acre; and it was proved that 40*l.* per acre and upwards had been offered for it. It was impossible, therefore, to avoid entertaining strong doubts concerning the fairness of the terms of the purchase; and the Court, so long as it felt these doubts, could not enforce the contract.

To the first of the two objections, Mr. *Shadwell* and Mr. *Roupell* replied, that the Court could not listen to any allegations concerning a supposed parole agreement, by which, upon a certain event, *Whitby* was to retain part of the property comprehended in the written contract: for no such matter had been put in issue in the cause; and, consequently, *Parken* had not had an opportunity of either explaining or disproving the circumstances, of which his adversary now sought to take advantage.

On the subject of value, they relied on the evidence of their own witnesses, several of whom swore that the price fixed was as much as the property was fairly worth: and they further contended, that, in a contract like the present, the Court was bound by the opinion of *Franklin* and *Olley*. The agreement had stipulated expressly that the price should be fixed by these two gentlemen; it had been fixed by them; and to look now at any other mode of estimating the value, would be a departure from the contract in one of its most essential terms. *Milnes* v. *Gery*. (*a*)

The MASTER of the ROLLS.

The contract between these parties comprised not only all *Whitby's* real property, but every thing which he was possessed of: and the price of the whole was to be

(*a*) 14 Ves. jun. 400.

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1,364*l.* 14*s.* That is the agreement which I am called upon to execute *in toto*: and, if I grant the plaintiff the relief which he prays, I must order the real estate to be conveyed and the personalty to be delivered to him, and that he, on his part, pay the 1,364*l.* 14*s.* Such a decree, however, would be altogether wrong: it would give the plaintiff a right to recover goods, to which his own witness, corroborated by his own answer, proves that he has no title; and it would render him liable to pay 79*l.*, which, it is admitted on all hands, he ought not to pay. For it appears from *Parken's* answer, that, after the valuation by *Franklin* and *Olley*, the vendor retained the furniture, linen, china, &c., and, in respect of them, the purchaser made a deduction from the price. This is an admission that the written contract was in part done away with; so that it is clear that the Court has not the whole of the case before it. Then the testimony of *Burleigh* explains how it happened, that many of the articles comprised in the valuation were retained by the vendor. From him I learn, that the agreement set forth in the pleadings was accompanied by a collateral verbal agreement, by which, upon a certain event, the written contract was to become inoperative in part: and this collateral agreement was of such a kind as to be *ab initio* a fraud upon the laws; for the object of it was to screen *Whitby's* personal effects from the consequences of a conviction under the game acts in a prosecution then pending against him. If he was convicted, the written contract was to take effect: it was not to take effect, if he was not convicted.

The counsel for the vendor have insisted, that, upon this ground alone, the bill ought to be dismissed. And undoubtedly, if the pleadings had stated that the contract involved, or was accompanied by, an agreement intended to be a fraud upon the game laws, the court would not entertain a suit for specific performance. But the circumstances, on which the objection arises, are not stated either

in the cross-bill or in the answer to the original bill; so that *Parken* has had no opportunity of defending himself against them. The original suit, therefore, is not now ripe for dismissal.

On the other hand, it has been argued, that the court cannot take any notice of the existence or nature of this collateral agreement, because, in the pleadings, nothing has been put in issue concerning it. Suppose a bill were filed for the specific performance of a contract for the purchase of a cargo of spirits, and it were to appear in the course of the evidence, that the cargo was smuggled; the court would not shut its eyes to a fact so presented to it, even though neither party had put the fact in issue. Here it comes out from *Parken* himself, that the contract, stated in the bill, is not the whole contract; and must I not know the whole contract, before I am called upon to decree specific performance? It comes out, too, from *Parken's* own witness, that the written contract was accompanied by another agreement apparently of an illegal nature: must not this point also be cleared up, before the Court can deal finally with the cause? The proper course would be, to put these matters in a train of investigation, by directing an inquiry, whether the written contract was accompanied by any and what agreement concerning *Whitby's* furniture, plate, linen, china, and books; and on what account it was, that the vendor retained some of the articles included in the contract, while the purchaser made a deduction from the amount of the valuation.

I think that there must likewise be an inquiry with respect to the value of the land. The evidence impeaching the valuation of *Franklin* and *Olley* is in its nature more to be depended upon, than the testimony of the surveyors by whom that valuation has been supported. My own opinion, upon the evidence, is, that the land was worth more than the price which has been fixed: and I certainly

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cannot accede to the position, that, because the parties, by their contract, referred the ascertaining of the value to two individuals, the Court is bound by the judgment of those individuals, and cannot have recourse to other means in order to satisfy its own conscience.(*b*) The price was not to be fixed arbitrarily; the intention of the parties was, that the land should be sold for its full value; and the reference to the judgment of *Franklin* and *Olley* was merely the mode of fixing that value. If the Court were satisfied, that the price set by them on the property did not come near the true value, it would never interfere to enforce the performance of the contract.

A witness, named *Carter*, having been examined for *Whitby*, Mr. *Shadwell* objected to the reading of his evidence, because he had admitted upon cross-examination, that he conceived himself bound in honour, though not legally bound, to contribute to the expenses of the cross-suit, as it was partly at his recommendation that *Whitby's* solicitor had undertaken and continued to prosecute the suit.

Mr. *Sugden*, contra, cited the cases mentioned in Phillipps's Treatise on the Law of Evidence. (*c*)

The MASTER of the ROLLS was of opinion, that, according to the latest authorities, the evidence was admissible.

(*b*) *Emery* v. *Wase*, 5 Ves. jun. 846., and 8 Ves. jun. 517. *Hall* v. *Warren*, 9 Ves. jun. 605.

(*c*) Vol. I. p. 54, 55. Fifth edition.

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At the Rolls.
Nov. 20.

A testator gives a sum of stock to trustees, which they are to stand possessed of upon trust for *D. G.* until he shall attain the age of twenty-five years, and are to transfer to him when they in their discretion shall think proper; he likewise directs, that, if *D. G.* dies without lawful issue before receiving the bequest, the stock shall sink into the residue of his the testator's estate; and he bequeaths the residue to *W. F.*: while *D. G.* is under twenty-five years of age, and has not had the stock transferred to him, neither he nor *W. F.* is entitled to receive the accruing dividends; but these dividends must accumulate, to accompany the capital in its final destination.

A testator directs, that *W. F.* shall, with a capital taken out of his assets, continue his the testator's business; that he shall bind *D. G.* apprentice to himself; that he shall take *D. G.* into partnership at the end of his apprenticeship or so soon after as he shall think him capable; and that *D. G.* shall have one-third of the profits of the business: *D. G.* is not entitled to claim any share of the profits which are made before he is admitted into partnership.

JAMES STUART, by his will dated the 23rd of *April*, 1821, bequeathed to his three trustees and executors (of whom *William Forbes* was one) various sums of stock, upon trust, as to the sum of 33,333*l.* 6*s.* 8*d.* 3 *per cent.* consolidated bank annuities, to pay, out of the dividends thereof, to his wife *Elizabeth Stuart* a clear annuity of 1,000*l.* *per annum*, during her life: and upon further trust, that, immediately after her death, they should transfer to the testator's nephew *William Forbes* one moiety of the said sum of 33,333*l.* 6*s.* 8*d.* 3 *per cent.* cons., and for him to receive 500*l.* *per annum*, being the moiety of the amount of the dividends of the stock, he taking the name and using the arms of *Stuart:* and, upon further trust, as to the sum of 16,666*l.* 13*s.* 4*d.*, the remainder of the sum of 33,333*l.* 6*s.* 8*d.* 3 *per cent.* cons., that his said executors and trustees should stand possessed thereof upon trust for his nephew *Donald Gordon*, until he should have attained his age of twenty-five years. The testator then directed his executors and trustees, the survivors and survivor of them, their executors and administrators, to transfer the said sum of 16,666*l.* 13*s.* 4*d.* unto *Donald Gordon* for his own use and benefit, when and so soon as they should, in their discretion think proper: and, in case *Donald Gordon* should die without lawful issue

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before receiving the bequest, the said sum of 16,666*l.* 13*s.* 4*d.* was ordered to sink into the residue of the estate.

In a subsequent part of the will, the testator, after directing that his trade should be carried on by *William Forbes* with a capital to be taken out of his personal estate, expressed himself as follows:—"I request and direct, that *William Forbes* shall take under his care and protection and educate and support the said *Donald Gordon*, until he shall have obtained a proper age to be bound apprentice, and when he shall have attained that age, then I direct, that the said *William Forbes* shall bind the said *Donald Gordon* apprentice to himself; and from and after the said apprenticeship shall have expired or so soon after as the said *William Forbes* shall in his judgment think the said *Donald Gordon* fit and capable, he the said *William Forbes* shall take the said *Donald Gordon* into the said trade and business as a co-partner therein, and that the said *Donald Gordon* shall have one-third part or share of the profits of the said business with the said *William Forbes*." He also gave to *William Forbes* the residue of his personal estate.

The testator died in 1821, and his wife survived him by only a few months. When she died, *Donald Gordon* was about ten years of age.

The stock was standing in the names of the trustees; and the principal question was, who was entitled to the dividends of the 16,666*l.* 13*s.* 4*d.* 3 *per cent.* cons., from the death of the widow until there should be a transfer of the legacy to *Donald Gordon*.

Mr. *Wingfield*, for *Donald Gordon*.

The testator has separated this sum of 16,666*l.* 13*s.* 4*d.* stock from the general mass of his estate, and has given

it to trustees who are to stand possessed of it expressly upon trust for *Donald Gordon*, until he shall have attained a particular age. In the mean time, the stock is held, and consequently, the dividends are received, in trust for him. To decide that any other person is entitled or that *Donald Gordon* is not entitled to the accrued and accruing dividends of the stock would be to declare that the trustees are not now trustees for *Donald Gordon*.

Mr. *Shadwell* and Mr. *Barber*, for *William Forbes*.

The will directs, that, if *Donald Gordon* shall die without issue before receiving the legacy, the 16,666*l*. 13*s*. 4*d*. is to sink into the residue; and that residue is given to *William Forbes*. Thus there is an express gift of the legacy over upon the happening of one contingency. Now the authorities decide, that, where a legacy payable at a future time is given over in case a particular event happens before it becomes payable, the time of vesting is attached to the time prescribed for payment. *Palmer* v. *Mason*;(a) *Herle* v. *Greenbank*;(b) *Mackell* v. *Winter*.(c) Hence it follows, that *Donald Gordon* has not a vested interest in the legacy; and, consequently, he cannot now be entitled to the dividends of the stock. Under these circumstances, the dividends which shall accrue in the interval between the death of the widow and the vesting of the legacy, must sink into the residue, and go as part of the residue to the residuary legatee. The trust for *Donald Gordon* is of the corpus of the stock only.

The MASTER OF THE ROLLS.

The question upon this will presents three different aspects. First, are the dividends of this sum of stock to go immediately to the infant during his minority, and before any transfer is made to him? or secondly, do they belong

(a) 1 Atk. 505. (b) 3 Atk. 718. (c) 3 Ves. jun. 536.

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in the meantime to the residuary legatee? or thirdly, does the right to them remain in suspense, until the event shall have shewn whether the legacy is to go over from *Donald Gordon* or not?

This testator has given a sum of stock to trustees, who are also his executors, and has directed them to hold it in trust for *Donald Gordon*, until he shall have attained his age of twenty-five years. Thus far there are words of express gift to the trustees only. He next adds, that they are to transfer the stock to *Donald Gordon*, when and so soon as they shall in their discretion think proper. So that there are no direct words of gift to *Donald Gordon*, except through the medium of the discretionary transfer by the trustees, and there is no fixed time at which that transfer is to be made. If he should die without issue, before the stock is transferred to him, the bequest is to sink into the residue, and, as part of that residue, will go over to *William Forbes*. The vesting of the legacy, therefore, must in the mean time, be suspended. For these reasons, it seems to me impossible to hold, that *Donald Gordon* can have any present right to the dividends.

At the same time, this much is clear,—that, until *Donald Gordon* attains twenty-five years of age, the trustees are to hold the stock in trust for him. Then, how can it be the true construction of the will, that the dividends are in the mean time to belong to *William Forbes*? Surely, if the residuary legatee were now entitled to those dividends, the present trust would be for that residuary legatee, and not for *Donald Gordon*. It has been said, indeed, that the trust is of the corpus of the stock only, and not of the dividends: but the testator had no intention to separate the dividends from the corpus; he meant generally that the right to the capital should draw to it also the right to the interest. The will contains no intimation that *William Forbes* is to have the interme-

diate dividends: on the contrary, it states in express terms what interest the residuary legatee is to have in this sum of stock; and that is an interest which is to arise only in one event—the event of *Donald Gordon's* death without issue before the stock has been transferred into his possession.

The due construction of the will is this:—During the period which shall elapse until the trustees think fit to exercise the discretion reposed in them, the dividends and interest are not disposed of, and are reserved to await the final disposition of the capital: but if at any time the trustees transfer the stock to *Donald Gordon*, from that moment the original trust, which attached upon it at the testator's death, takes effect in his favour; and, having the principal transferred to him, he becomes entitled also to the accumulated dividends.

William Forbes, in pursuance of the directions contained in the will, carried on the trade after the testator's death: and the bill insisted, that he was a trustee of a third part of the profits for *Donald Gordon*.

The MASTER OF THE ROLLS was clearly of opinion, that *Donald Gordon's* right to participate in the profits of the trade which was to be continued with a capital taken from the testator's estate, commenced only from the time when he should be admitted into the partnership. *William Forbes* was to educate and support him, and was afterwards to bind him apprentice to himself: was it likely that the testator should have required *William Forbes* to support his own partner, or that he should have intended *Donald Gordon* to be at once partner and apprentice in the same mercantile concern? Until the young man's apprenticeship should have expired, the business was to be carried on by *Forbes*, that is, by *Forbes* solely and for his own profit.

FARQUHARSON *v.* SETON.

Nov. 24.

Where a cause was not proceeded in for three clear terms after answer, the common order to dismiss the bill for want of prosecution, obtained by the defendant in the vacation after the third term, was held to be regular.

THE defendant *Seton* put in his answer to the plaintiff's further amended bill in the vacation after Michaelmas Term 1822, and, the plaintiff not having proceeded, obtained the common order to dismiss the bill for want of prosecution in the vacation after Trinity Term 1823. A motion was now made to discharge the order with costs for irregularity.

Mr. *Agar*, in support of the motion, contended, that the order was irregular, insisting upon the plaintiff having been entitled to three clear terms, and the vacation after the last term, to proceed with the cause. He cited *Mangleman* v. *Prosser*, (*a*) and *Findlay* v. *Wood*. (*b*)

Mr. *Palmer* against the motion.

The LORD CHANCELLOR, having consulted the Registrar, said that he was of opinion that the plaintiff was not entitled to the vacation; but, it being stated that a misunderstanding had prevailed as to the practice, His Lordship discharged the order, the plaintiff paying the costs.

(*a*) 3 B. C. C. 191. (*b*) 1 V. & B. 499.

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BETWEEN CHARLES SHEPHERD and THOMAS ADLINGTON, on behalf of themselves, and all other the Creditors of JAMES STRANGE, JAMES DASHWOOD, JOHN AGNEW, and GEORGE PEACOCKE, PLAINTIFFS;

AND

JOHN TOWGOOD, JOHN INGRAM, JAMES STRANGE, JAMES DASHWOOD, GEORGE PEACOCKE, and EDWARD HOWELL, DEFENDANTS.

Nov. 18, 24.

A creditor, who makes out a *prima facie* case of misconduct in trustees, is entitled to a decree that they shall account for whatever they might might have received without their wilful default or neglect; though, in a prior suit instituted by another creditor and conducted without collusion, a common decree for an account has been previously made against them.

IN 1803, the banking-house of Messrs. *Strange, Dashwood*, and Co. being in embarrassed circumstances, *James Strange, James Dashwood, John Agnew*, and *George Peacocke*, (who were the partners in it,) did, by deeds bearing date on the 19th of *July*, assign and convey all their property, whether joint or several, to *Towgood, Ingram*, and *Burrowes*, their heirs, executors, administrators, and assigns, upon certain trusts. These trusts, in substance, were, that the property should be gotten in and sold; that, out of the produce of the separate estate of each partner, his separate debts should be paid rateably, and the surplus of it (if any) carried over to the partnership funds — that the partnership funds should be applied in payment of the joint creditors rateably—that the surplus (if any) of the share of each partner in the joint funds should go in discharge of such of that partner's separate debts as had not been previously satisfied out of his separate estate—and that the ultimate surplus should be paid to the four partners in such proportions as might be according to their several rights. The first dividend was to be made, whenever the

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trustees should have money enough to pay four shillings in the pound upon the debts; and further payments were to follow from time to time, as often as funds should be realized sufficient to yield one shilling in the pound. The trustees were likewise invested with various powers, one of which was, "to settle and agree with any of the creditors, whose respective debts together do not amount to more than 3,000*l.*, and to make them such payment or compensation for the same by way of composition as they may respectively agree to accept." On the other hand, the creditors, who were parties to the deed, agreed not to institute any suit or action (except under the deed of trust) for the recovery of their debts; and they granted to the four partners a license, which was to be in force until the trustees should declare it to have ceased, to go about their affairs without impediment to their persons or subsequently acquired property.

Towgood and *Ingram*, but principally the former, acted in the execution of the trust. In *May* 1805, a dividend of two shillings and sixpence in the pound was paid.

At the time of the creation of the trust, *Strange*, *Dashwood*, *Agnew*, and *Peacocke* were indebted to Lord Viscount *Anson*, both in a considerable sum secured by their joint and several bond, and also on a balance due upon his banking account. In *June* 1805, his Lordship filed a bill, on behalf of himself and all the other creditors, against the trustees and other necessary parties, praying that an account might be taken of *Strange's* separate estate and separate debts—that the sum due to him, Lord *Anson*, on the joint and several bond might be discharged out of that separate estate—that an account might likewise be taken of the trust property which had come into the hands of the trustees, and of their payments in respect thereof—and that the deed of trust might be carried into execution under the direction of the court.

In 1811, the trustees compromised this suit by paying Lord *Anson* his bond debt and 500*l.* for his costs.

On the 9th of *February* 1819, another suit on behalf of creditors was instituted by the personal representatives of Lord *Anson*, along with some other members of the same family, who had claims upon the trust property. The bill mentioned the former suit, and the termination of it by a compromise, but did not make that transaction a ground of charging the trustees with negligence or misconduct; and it prayed, among other things, that an account might be taken of all the joint and separate estates of *Strange*, *Dashwood*, *Agnew*, and *Peacocke*, which had been possessed or received by *Towgood* and *Ingram*, or, without their wilful neglect or default, might have been received by them. In that suit, *John Stevenson Salt* was, in *December* 1819, appointed receiver; and, on the 18th of *May* 1822, a decree was made. By that decree it was declared, that the deeds of the 19th of *July* 1803 ought to be established, and the trusts thereof carried into execution; and it was ordered, that the Master should take an account of the joint and separate estates of *Strange*, *Dashwood*, *Peacocke*, and *Agnew*, which had been possessed and received by *Towgood* and *Ingram*, or either of them, or by any person or persons by their or either of their order, or for their or either of their use, and how they had applied and disposed of the same—that he should appoint new trustees in the room of *Burrows* and *Ingram*—and that he should take the usual accounts of the joint and separate debts due from the co-partnership, and from the individual partners, and of the payments which had been made in respect of any of those debts.

In the mean time, the mode, in which a portion of Mr. *Dashwood's* separate estate had been dealt with, gave rise to another suit. Upon the marriage of that gentleman with *Sarah Moseley* in *January* 1786, 2,000*l.* four per cent.

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bank annuities, and a sum of 16,000*l.* were transferred and paid to Mrs. *Betty Purchase;* and it was by the marriage settlement declared, that Mrs. *Purchase* should stand possessed of those two sums, upon trust to receive the annual interest and dividends thereof, and to pay the same to *James Dashwood* during his life, for his sole behoof and advantage. The annual income of this fund was received by Mrs. *Purchase* during the whole of her life; and, after her death, which happened in 1814, it was received by her executors, *Burley* and *Walcot;* but neither Mrs. *Purchase* nor her executors had accounted to the trustees of *Strange, Dashwood,* and Co. for the dividends and interest which accrued subsequently to the execution of the indentures of the 19th of *July* 1803. Under these circumstances, the receiver, in 1820, filed a bill in his own name, and in the names of the trustees, and of *Strange, Peacocke,* and the assignees of *Agnew,* against *Dashwood* and his wife, and *Burley,* the surviving executor of Mrs. *Purchase,* in order to compel payment of those dividends. That suit was still pending.

The present bill was filed in *November* 1821, by two joint creditors of *Strange, Dashwood,* and Co., on behalf of themselves and all the other creditors of *Strange, Dashwood, Peacocke,* and *Agnew.* It accused the trustees of gross negligence, and breach of trust; specifying, as particular instances of misconduct, their compromise of Lord *Anson's* suit, and their omission, during a period of nineteen years, to compel payment of the yearly income of the fund which was vested in Mrs. *Purchase.* It insisted, that they ought to be personally answerable for the loss which the estate had sustained by their failure to perform their duty: and, in addition to the usual accounts, including an account of all that *Towgood* and *Ingram,* without wilful default or neglect might have possessed or received, it prayed specifically, that they might be charged with the whole annual dividends of the trust funds re-

ceived after the 19th of *July* 1803 by Mrs. *Purchase* or her personal representatives, or with so much of those dividends as they, without their wilful default or neglect, might have received.

The defendant, *Towgood*, by his answer contended, that this bill was altogether unnecessary and vexatious, and that every purpose, which was sought by it, might be fully accomplished under the decree made in Sir *George Anson's* suit.

The plaintiffs did not enter into any evidence, but relied on the admissions in *Towgood's* answer, relative to the compromise with Lord *Anson*, and the transaction with Mrs. *Purchase*.

Upon the first of these points, the following were the principal admissions:—" that the trustees did, with a view of putting an end to an expensive suit, which had been commenced against them by Viscount *Anson*, to enforce payment out of the separate estate of *James Strange*, of the amount due from Messrs. *Strange, Dashwood*, and Co. for principal and interest on their joint and several bond, pay to Lord *Anson*, out of such of the trust funds as arose from the separate estate of *James Strange*, the amount due for principal and interest on the bond, together with the sum of 500*l.* in lieu of his costs and expences, and also over and above the dividend of 2*s.* 6*d.* in the pound, which was paid to him out of the trust funds belonging to the joint estate upon the amount due to him on his banking account;—that such payments out of the separate estate of *Strange* were made to Lord *Anson*, in pursuance of a proposal and agreement entered into between this defendant and his co-trustees or their solicitor, and Lord *Anson* or his solicitor for putting an end to the suit, which proposal and agreement were made and entered into under the advice of eminent counsel, and with the sanction of some of the principal creditors of Messrs. *Strange, Dashwood*, and

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Co.;—that such agreement was highly advantageous to the creditors of the said estate, and particularly to the joint creditors, inasmuch as the suit, if proceeded in, must have put the estate to very great costs and expences, which were saved by the means actually used; that no bill was made out or produced shewing in what manner the costs, in respect of which the said payment was made by this defendant and his co-trustees, were incurred; but the defendant was induced to believe, at that time, and now believes, that the costs, which the trust estate was liable to pay in the suit, were very considerable, and would, if ascertained in the usual manner, have amounted to the sum of 500*l.*:—and, that the suit was so compromised by this defendant and his co-trustees for the purpose and with the view of benefitting the trust estate."

The following was the account given by *Towgood's* answer of the circumstances under which Mrs. *Betty Purchase* and her executors had been permitted to receive the dividends and interest of the two sums of 2,000*l.* 4 per cent. bank annuities and 16,000*l.*, in which Mr. *Dashwood* had, by his marriage settlement, a life interest:—"That, in the year 1801, *Betty Purchase* lent to the house of *Dashwood* and Co. the sum of 6,357*l.* 15*s.* 4*d.* 3 per cent. consolidated bank annuities, and the sum of 2,000*l.* 4 per cent. bank annuities, part of the funds purchased with the money settled on the marriage of *James Dashwood*;—that, for securing the same, *Strange, Dashwood*, and Co. did, by an indenture, bearing date on the 11th of March, 1801, assign unto *Betty Purchase* 8,000*l.* and interest, and the security for the same, which sum was due to *Strange, Dashwood*, and Co. on a mortgage of certain hereditaments in St. James's Street;—that, after the execution of the indentures of the 19th day of July 1803, *Betty Purchase* made proposals to this defendant, and his co-trustees, for the purchase by her of the life interest of *James Dashwood*, in the two sums of 2,000*l.* 4 per cent. bank annuities, and 16,000*l.*, and much

negotiation on the subject of such proposal took place; —that it was proposed on the part of *Betty Purchase*, that she should pay 5,000*l.* for such life interest, and the proposal was acceded to on the part of this defendant and his co-trustees, but no agreement was then definitively concluded;—that a further negociation afterwards took place, when *Betty Purchase* proposed that this defendant and his co-trustees should accept the sum of 6,357*l.* 15*s.* 4*d.* 3 per cent. bank annuities, and 2,003*l.* 4 per cent. bank annuities, secured to her by the said assignment of the said sum of 8,000*l.* and interest, and the mortgage for the same, as part of the purchase money for *Dashwood's* life interest;—that the trustees, having been advised, that they could not, under the powers given by the indentures of the 19th day of July 1803, sell a part of the separate estate of *James Dashwood*, and take in payment for the same a release of a debt due from the joint estate of Messrs. *Strange*, *Dashwood*, and Co., declined that proposal;—that *Betty Purchase*, to the time of her death, and her executors, after her death, received the dividends and interests of such part of the two sums of 2,000*l.* 4 per cent. bank annuities and 16,000*l.*, as had not been advanced and lent by her to Messrs. *Strange*, and Co.; —that, after the death of *Betty Purchase*, some further negotiation took place between her executors and the trustees, relative to *James Dashwood's* life interest in the two sums in question, but they were not able to come to any satisfactory arrangement, and that, in consequence thereof, a suit, for the purpose of recovering the amount of the dividends and interest on the two sums of 2,000*l.* 4 per cent. bank annuities and 16,000*l.*, was commenced in 1820; —that the same was not commenced sooner in consequence of the negotiations, which, from time to time, took place between the trustees and *Betty Purchase*, in her life time, and her representatives after her decease, which negociations, it was hoped, would have led to an amicable termination of the matters in difference, without the

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necessity of resorting to proceedings either at law or in equity."

Mr. *Shadwell* and Mr. *Stephen*, for the plaintiffs.

We have made out, in two different instances, a strong *prima facie* case of misconduct against these two trustees. They have been guilty of gross negligence in omitting to get in the trust property; and they have expended part of it in an improper compromise of a suit, which would have forced them to come to an account. Under these circumstances, a creditor is entitled, not merely to the common decree for an account, but to a decree making them responsible for all that they might have received, without wilful default or neglect. We admit that suits are not to be multiplied without adequate cause; that, after one creditor has filed a bill, and, much more, after he has obtained a decree, another creditor is not to institute a second suit for the same object; but we now come for relief which the former suit has not given, and could not give. The decree in *Anson* v. *Towgood* is useful, so far as it goes, but it does not go far enough; and the object here sought is, to extend and complete the investigation which that decree has left imperfect.

Mr. *Horne* and Mr. *Daniel*, for the trustees.

The compromise of the former suit is mentioned in Sir *George Anson's* bill; and, even if it had been omitted, all the relief, that can be prayed with respect to it, might be had under the existing decree. For, if the payments made by the trustees on that occasion were improper, the allowance of them, in the trustees' account, may be resisted in the Master's office, which will necessarily bring the whole subject before the view of the Court or of its officers. The inquiries too, which will be prosecuted under that decree, will shew, what part of that trust property has been

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gotten in, and what part of it is still outstanding; and, upon the report of the Master, such further investigation or proceedings may be directed as shall then appear to be expedient. In that way the transactions with *Betty Purchase* may be sifted; if, indeed, it is proper to discuss them in any suit, except that which has been instituted for the express purpose of ascertaining the rights of the trust fund against the representatives of that lady. The bill, therefore, introduces nothing which was not previously before the Court, or might be brought before it, in suits already pending; it asks no relief which might not have been had in the prosecution of the decree already pronounced. The sole object and effect of it is, to throw upon the trustees the oppression, and upon the trust fund the costs, of two suits instead of one.

The plaintiffs have no evidence, except the statement contained in the answer of Mr. *Towgood*. He denies that he has been guilty of wilful default or neglect; and he swears, that, in the two transactions particularly alluded to in the bill, every thing was done, *bona fide*, for the benefit of the creditors. What more could be required of trustees? how, upon such a state of the evidence, can it be assumed, that they have been guilty of wilful neglect or default?

Mr. *Sugden*, Mr. *Pepys*, Mr. *Treslove*, and Mr. *Turner*, for other defendants.

The MASTER OF THE ROLLS. *Nov.* 24.

The outline of the case is extremely simple. It is a bill filed by creditors on behalf of themselves and all other the creditors of certain persons, calling for an account against trustees, to whom the effects of the debtors were long ago assigned. Had the account sought been a simple account in the ordinary form, and had there been

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no antecedent suit, the decree would have been quite of course. The difficulties, that present themselves, arise from two causes. The first is the particular nature of the account prayed. The plaintiffs are not satisfied with an account against the trustees in the common form, but desire that there should be an immediate inquiry whether the trustees have been guilty of any wilful neglect and default. For such a decree a special case must be made; and it is insisted, on the part of the defendants, that there is not a sufficient case made out to entitle the plaintiffs to an account in that form.

Secondly, it is said that,—even if such a case were made out,—still,—considering that this bill is filed in November, 1821, after an antecedent suit, which is at this moment depending, and has been the subject of a decree pronounced in the year 1822, between, substantially, the same parties, and directed to the same general objects,—an objection arises to it on the ground of the unnecessary multiplication of suits, and the consequent aggravation of expence to a fund like the present, if a latitude be given to creditors successively to file different bills for the execution of the same trust.

The subject of inquiry thus divides itself into two questions:—First, supposing that this were the first and only suit, do the plaintiffs bring forward a sufficient case to entitle them to the relief prayed?—Secondly, do the proceedings in the prior suits constitute a valid objection to that relief?

In order to entitle them to the special relief prayed, the plaintiffs bring forward two transactions; the first is the compromise of the suit instituted by Lord *Anson*; the second, the transaction relating to Mr. *Dashwood's* life interest in certain funds, which, it is alleged, the trustees have not used due diligence in recovering, for the benefit of

the creditors. What the Court has to advert to is, the facts relating to these two transactions, as they are detailed in the answer, with all the qualifications therein contained.

[Here the Master of the Rolls read the statements of the answer relating to the compromise of Lord *Anson's* suit.]

Now, it will be observed, that the trustees had not, by the trust deed, any special authority to compromise suits. They had authority to compromise the amount of a debt, but they had no authority expressly given to them to compromise any suit. In the next place, as far as we can follow analogy, persons standing in a situation somewhat similar to that of trustees, I mean, assignees of a Bankrupt's estate, are expressly prohibited from compromising or instituting any suits, without calling the creditors together and having their sanction. It is not pretended that any such meeting was held; it is expressly admitted, that the compromise was without the privity and consent of the present plaintiffs. The defendant says, that it is stated that the compromise was made with the privity of the principal creditors, under the advice of counsel, and *bona fide*, with an object to save expence. But the question is not, whether they might not have conducted themselves substantially with a view to benefit the estate, but whether trustees can be permitted to act in this manner, without being subject to further inquiry into their conduct?

What was the nature of the suit which was thus compromised? It was a suit by creditors calling only for an account from the trustees; and it had been permitted to go on for five years without any attempt to stop it. In the next place, the trust estate gained nothing by what is called a compromise, except that an end was put to the suit; and that was purchased by the payment to Lord *Anson* of the principal and interest of his bond, and also of 500*l.* for costs—those costs not being taxed, not being even as-

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certained by the delivery of any bill. This payment is made at a time, when all that could have been the result of going on with the suit would have been an inquiry into the conduct of the trustees, in the execution of their trust.

Now, if, in general, there is an obligation on trustees, before they compromise suits, to give the creditors an opportunity of meeting in order to consider the propriety of making a compromise, there is a peculiar propriety in their doing so, when the sole object of the suit proposed to be compromised is, to inquire into the conduct of the trustees, and to transfer the management of the trust to this Court. Besides, what did the trustees gain? That suit was not more objectionable than any other. Benefit might have resulted, if all had been content to leave the matters of the trust to private management; but considering the number of creditors, and the difficulty of keeping them quiet, there was great probability, (particularly when 500*l.* had been paid to stop one suit), that another suit would soon spring up. Accordingly, in 1819, other members of the same family file another bill, thus involving the estate in the expense of all the stages of a new suit. Under these circumstances, I feel that this is a transaction which ought to be inquired into.

The next point, upon which the plaintiffs rely, arises out of the transaction relative to *Dashwood's* life interest in certain sums.

[Here the *Master of the Rolls* read from the answer the statement of these transactions.]

Here not a single step is taken, down to 1820, for the recovery of property, considerable in amount; though not only was the general obligation cast on the trustees of making the estate productive to the utmost on behalf of the creditors, who, trusting to the zeal and activity of the trustees, had surrendered all right of recovering payment of their debts

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but they had agreed to render accounts half-yearly for the inspection of the *cestuis que trust*, which shewed that they were, from time to time, to make the property available as fast as they could. Is it possible to state that this is not a case of wilful neglect? In the year 1820, it is said, a suit was instituted to recover this demand. But, in the first place, that is a suit by the receiver; in the next place, it is not directed against the trustees to make them responsible for their neglect, but against the representatives of *Betty Purchase*, to make them refund what has been improperly received by them or their testatrix.

The difficulties are not slight, which are thrown in the way even of that suit by the neglect of the trustees to assert their right at an earlier period. But its existence has not the smallest bearing on the propriety of the present demand. The creditors are not to be sent round to *Betty Purchase*, and to those who were permitted to receive what belonged to the trust fund. They have a right to resort to the trustees without the least reference to *Betty Purchase*, and to make them personally responsible for the consequences of their neglect. I am therefore of opinion, that, supposing this to be the first and only suit, there is a clear right in the creditors to extend the relief against the trustees in the way proposed by the bill.

The second question is, whether the existence of a prior suit constitutes a bar or an objection to the institution of another suit on the behalf of creditors praying extended relief. Substantially, a bill by one of a set of creditors, on behalf of themselves and all others, is considered as making all those creditors parties to it: and the Court will never permit a second or third suit to be instituted for the same object, with the same parties, and directed to the same relief. If the relief in the first suit can be extended, if expense can be saved by incorporating with the suit any proceeding that will avoid the necessity of a

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second bill, there may be a great propriety in not permitting another suit to go on. But, on the other hand, it never can be contended, nor is it the law of this Court that a second suit may not be rendered necessary, either by collusion in the former suit, or by the inattentive mode of framing it, which may have left out some principal matters of charge against the trustees, or by the omission, from ignorance or negligence, of some important ground of relief. In fact it was so decided in the present case: for, when a motion was made to stop the proceedings in this suit, if the bare circumstance of an antecedent depending suit constituted a good bar, it would have been stopped immediately. It was, however, permitted to proceed to a hearing; in order to see, whether the plaintiffs would make out an apology and justification for it by shewing substantial novelty. They have done so; they have correctly supplied, in important particulars, that which could not have been introduced in the former suit. That creates, on their part, a fair and just claim to relief from a Court of Equity. Were it otherwise, there would be a failure of justice. It never can be permitted, that the priority of a suit, defective in its nature, is to exclude another suit that may introduce important matters, without which complete justice can not be done to the creditors.

The question then is, does the present suit introduce such substantial novel matter as makes it fitting to be received, supplementary to the antecedent suit? And is it become absolutely necessary?

The proceedings in the suit of Sir *George Anson*, appear to have been conducted very properly: but that suit, though it introduces the compromise of the former suit, and the payment of the 500*l.*, does not state them in the same way as they are stated here, nor as matter of charge against the trustees. On the subject of the transaction with *Betty Purchase*, it is totally silent.

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If, therefore, there was a necessity to vindicate the rights of the creditors on the two subjects I have mentioned, there was unquestionably a necessity for another suit. At the same time we must be careful to guard against any unnecessary expense.

This suit must be supplemental to the former suit, and incorporated with it; it must be referred to the same Master; the solicitor for these creditors must have liberty to attend the proceedings under the former decree; and the general account is not to be gone into anew.

The decree was as follows:

Declare that the plaintiffs, on behalf of themselves and all other the creditors of *James Strange*, *James Dashwood*, *John Agnew*, and *George Peacocke*, are entitled (in addition and by way of supplement to the account which has been already directed by the decree, bearing date the 18th day of May, 1822, made in this cause, wherein Sir *George Anson*, and others, are plaintiffs, and *John Towgood*, and others are defendants,) to a further account of all the joint and separate estate and effects of the said defendants *James Strange*, *James Dashwood*, *George Peacocke*, and *Edward Howell*, or either of them, which, without the wilful neglect or default of the said *John Towgood* and *John Ingram*, or either of them, might have been received or possessed by them or either of them; and let it be referred to Master *Stratford* (to whom the cause of *Anson* v. *Towgood* stands referred,) to take this additional account accordingly; but the Master is not to take over again or disturb any account which has been already taken by him, further or otherwise than may be necessary to let in any charges of wilful neglect or default, which the plaintiffs in this cause may be able to substantiate; and let the Master

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inquire and state to the Court, whether any and what loss, and to what amount, if any, has resulted to the trust estate of the said *James Strange*, *James Dashwood*, *George Peacocke*, and *John Agnew*, from any such wilful neglect or default, in case any such shall appear to have been committed, and the Master is to be at liberty to state any special circumstances respecting the same as he shall think fit; and, for the better taking of the accounts, &c., the parties are to be examined, &c.; and let the plaintiffs in this suit be at liberty to join in, and attend the said Master upon, the several proceedings before him, under the decree made in the said cause of *Anson* against *Towgood*; let due notice be given of such several proceedings to the plaintiffs in this suit, in like manner as if they had been parties in such former suit; and reserve the consideration as to the question of interest, and also of all further directions, and of the costs of this suit, &c.

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BETWEEN GEORGE FRANCIS TYSON, Executor of HENRY ASPINWALL deceased,

PLAINTIFF;

AND

ROBERT ALBION COX and Another, Assignees of GEORGE HENRY BROWN a Bankrupt, and SAMUEL WALKER and Others, Assignees of JOHN SISSON a Bankrupt,

DEFENDANTS.

Nov. 25.

A. and *B.* entered into a joint and several bond for securing a sum of money advanced to *A.* by his bankers. After the execution of the bond, and before it became due, *A.* paid money to the bankers, and he continued to draw upon them until his banking account was overdrawn. Some years afterwards an account was settled between *A.* and the bankers in which the whole money secured by the bond was treated as remaining due from *A.* The bankers then took a warrant of attorney from *A.* for securing payment of the balance found due upon the settlement by instalments at distant periods. Several of the instalments were paid, but *A.* became bankrupt before the whole debt was liquidated. It being proved that *B.* was privy to the settlement of accounts between *A.* and the bankers, and to the arrangement respecting the warrant of attorney; held, first that *B.* was not discharged by the time given to *A.*, and secondly, that the bond was not discharged by the course of payment, the money paid by *A.* to the bankers being applicable to the banking account, and the bankers being entitled to hold the bond and warrant of attorney as distinct securities.

Upon the occasion of the bond being executed the title deeds of an estate purchased by *A.* were deposited with *B.* as an indemnity against his liability upon the bond; the legal interest in the estate was likewise conveyed to *B.*, and it was agreed that he should also hold it as an indemnity. After the death of *B.* his executor delivered up the title deeds to *A.*, upon a false representation by him that the bond had been paid off. Held, that a conveyance of the legal estate could not be compelled until the indemnity was worked out, and that the lien upon the title deeds remained.

GEORGE *Henry Brown* and *William Price* having contracted to purchase a set of freehold chambers in Lincoln's Inn for the sum of 3,000*l.*, *Brown*, in the month of April 1803, borrowed the sum of 1,000*l.* of Messrs. *Walpole Clarke* and *Sisson*, his bankers, for the purpose of enabling him to complete the purchase; on the 25th of April 1803, *Brown*, and *Henry Aspinwall* as his surety,

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entered into a joint and several bond to Messrs. *Walpole* and Co. for securing the repayment of the 1,000*l.*, with interest thereon, on the 25th of April 1804. Upon the purchase being completed, the chambers were conveyed to *Aspinwall*, in trust for *Brown* and *Price* as tenants in common in fee, and the title deeds were deposited with *Aspinwall*, by way of indemnity to him, as to one moiety of the chambers, for having joined in the bond; *Brown* at the same time signed and delivered to *Aspinwall* the following agreement; I do hereby agree that *Henry Aspinwall* and his heirs shall stand seized of my moiety of the chambers in Lincoln's Inn, as a security, to indemnify him the said *Henry Aspinwall* his heirs executors and administrators, against the payment of the 1,000*l.* and interest secured to Messrs. *Walpole* and Co. by the joint bond of him the said *Henry Aspinwall* and myself, and from all losses and costs in any way relating thereto. *Brown* had an open cash account with *Walpole* and Co., as his bankers, at the time of the execution of the bond, and the balance of that account was then in his favor. He also paid money into the banking house of *Walpole* and Co. after the bond was executed, but before it became payable; and he continued to draw monies out of the banking house from the time of the execution of the bond until the end of the year 1804, when his banking account, which was over-drawn, was closed. (*a*) In January 1807 a settlement of accounts took place between *Brown* and *Walpole* and Co., and the sum of 2,259*l.* was found to be due from *Brown* to *Walpole* and Co. on the balance of all accounts; upon the occasion of this settlement the whole of the 1,000*l.* secured by the bond was treated as a debt remaining due from *Brown*; *Walpole* and Co. then agreed to allow *Brown* time for payment on his giving security for the whole balance, and

(*a*) The balance due on this account was independent of the 1,000*l.* which was placed in the account to the credit of *Brown* as cash lent on bond.

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Brown accordingly, on the 23d of January 1807, executed a warrant of attorney to *Walpole* and Co. to confess a judgment against him for the sum of 2,259*l.*, payable by instalments, on the 25th of March 1807, the 24th of December 1807, and the 24th of December in each succeeding year until the whole should be paid. The partnership of *Walpole* and Co. was afterwards dissolved by the retirement of *Walpole* and the death of *Clarke*, and *Sisson*, the surviving partner, became bankrupt. At the date of his bankruptcy, several instalments, which had become due under the warrant of attorney, had been paid by *Brown*, but the sum of 1,100*l.*, part of the 2,259*l.*, was remaining unpaid; after the bankruptcy of *Sisson*, *Brown* also became bankrupt, and *Aspinwall* died, having appointed the plaintiff to be his executor. The bond was not removed out of the hands of *Walpole* and Co. after the execution of the warrant of attorney, nor was any conveyance executed by *Aspinwall* of the legal estate vested in him. The title deeds of the chambers also remained with *Aspinwall* up to the time of his decease, but soon after his death, *Brown* represented to the plaintiff that the 1,000*l.* and interest secured to *Walpole* and Co. by the bond had been paid off, and the plaintiff delivered up the title deeds to *Brown* on the faith of such representation.

It was prayed by the bill, that the bond might be delivered up to the plaintiff to be cancelled, or that the plaintiff, in case the Court should be of opinion that he was liable to pay any part of the 1,000*l.* and interest under the bond, might be declared to be entitled to a lien on a moiety of the chambers for so much as he should be held liable to pay.

Brown, who had obtained his certificate under the commission issued against him, was examined as a witness in the cause on the part of the assignees of *Sisson*, and

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proved, that in *December* 1806 he had an interview with *Aspinwall*, who had been applied to by Messrs. *Gregg* and *Corfield*, the solicitors of *Walpole* and Co., for payment of the bond, and that *Aspinwall* then told him to see Messrs. *Gregg* and *Corfield* on the subject, and do the best he could with them; that he accordingly saw *Corfield* on the subject, and made the arrangement with him respecting the warrant of attorney, and that he afterwards communicated the arrangement to *Aspinwall*, who expressed himself perfectly satisfied with it.

The cause was heard before the *Vice-Chancellor* on the 27th of *February* 1818, and a decree was then made, by which, the bill, so far as it sought to have the bond delivered up to be cancelled, was dismissed with costs, and it was declared that the plaintiff had a lien on the title-deeds of the chambers, against the defendants the assignees of *Brown*, for the amount of what he should pay or be liable to pay to the defendants the assignees of *Sisson*; *Brown's* moiety of the chambers was ordered to be sold for the purpose of satisfying the lien.

The plaintiff appealed from so much of the decree as ordered the bill, so far as it sought to have the bond delivered up to be cancelled, to be dismissed with costs.

The appeal was argued by Mr. *Horne* and Mr. *Roupell* for the plaintiff, Mr. *Hart* for the assignees of *Sisson*, and Mr. *Wingfield* and Mr. *Beames* for the assignees of *Brown*; and the *Lord Chancellor*, having taken time to consider the case, delivered the following judgment.

The first question in this case is whether *Aspinwall* was entirely discharged from all liability upon the bond in consequence of the arrangement made between *Brown* and *Walpole* and Co. There can be no doubt that he was so discharged if that arrangement was made without

his knowledge or consent, and he did not subsequently approve or confirm it, as the result was to give *Brown*, the principal debtor, time to pay the bond by various instalments. It is unnecessary to state the grounds upon which the Court has held that doctrine; it was much considered in the case of *Rees* v. *Berrington*. (*a*) The question to be decided as to the continuing liability of *Aspinwall* depends therefore entirely upon what is the fair result of the evidence of *Brown*, as it does or does not afford an inference that *Aspinwall* knew of the arrangement with *Walpole* and Co., or, whether he knew of it or not, that he constituted *Brown* his agent for the purpose of effecting it. Under the circumstances of the case I cannot think that the Court has been wrong in saying that *Aspinwall* was not entirely discharged. Considering the liability of *Aspinwall* to have continued, the question arises whether the bond has been wholly or in part discharged by the course of payment. As between *Brown* and the bankers, the settlement which took place when the warrant of attorney was given disposed of the question whether the monies paid antecedent to the bond becoming due were to be taken in discharge of the bond, or to be applied to *Brown's* account current with the bankers, and, *Brown* having acted in that settlement with the concurrence of *Aspinwall*, it appears to me that there is no ground to say that the payments ought then to have been taken in discharge of the bond. If it was not then discharged, I think the bankers were at liberty to consider themselves as holding the bond as one security and the warrant of attorney as another security. Another question has been raised whether the plaintiff, by reason of his having delivered up the title-deeds, is bound to convey the legal estate, which was vested in *Aspinwall* in trust for *Brown*, subject to the indemnity of *Aspinwall* against his liability upon the bond. I cannot think that

(*a*) 2 Ves. jun. 540.

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if a man delivers up title deeds upon a fraudulent misrepresentation he is therefore compellable to convey the legal estate which he holds as an indemnity. My opinion is that the legal estate is clothed with a trust to indemnify the plaintiff against his liability upon the bond, and cannot be taken out of his hands till that indemnity is worked out. The consequence is that this decree must be affirmed. (*a*)

Decree affirmed.

(*a*) The latter part of the judgment seems to have proceeded upon the supposition that the legal estate in the chambers was vested in the plaintiff; but it did not appear upon the pleadings that the plaintiff was either devisee or heir at law of *Aspinwall*.

COLEGRAVE *v.* MANLEY.

November 28.

A solicitor, who has declined to proceed with a cause, will be ordered, though his bills of costs are not paid, to deliver up the papers to the present solicitor of the party, the latter undertaking to hold them subject to the former solicitor's lien, for what shall be found due to him on the taxation of the bills.

An offer on the part of the former solicitor, after the motion is made, to proceed with the cause, will not prevent the Court from ordering him to deliver up the papers on the terms mentioned above.

ON the 5th of *August*, Mr. *Raphael*, the solicitor of the plaintiff, wrote to him a letter, in which he said, "I have assigned over your business, with others, to Mr. *Betholme* who has taken my house, and who, I doubt not, will do ample justice to your concerns."

The plaintiff declined to employ Mr. *Betholme* as his solicitor; and, finding that Mr. *Raphael* had, without his privity, delivered over the proceedings and papers connected with the cause to Mr. *Betholme*, he desired that they might be given up to Mr. *Winter*, his present solicitor. Mr. *Raphael* at first promised that they should

be put into Mr. *Winter's* hands; but he afterwards refused to deliver them up, till his bills of costs were paid; and the want of them was highly inconvenient to the plaintiff, by preventing the due prosecution of the inquiries which were going on in the Master's office.

Mr. *Hart* for the plaintiff, moved, that Mr. *Raphael* might be ordered to deliver to Mr. *Winter*, within a week, all the proceedings, papers, &c. in his custody which belonged to *Colegrave*, or related to the suit, *Winter* undertaking to hold them subject to *Raphael's* lien, and that the bills might be referred for taxation on the usual terms.

Mr. *Raphael*, in his affidavit, stated, that it had been and was his intention to continue to superintend the business.

Mr. *Treslove*, against the motion.

Mr. *Raphael* was willing to superintend the suit, so that the client would still have the benefit of his responsibility and attention. Even if he had absolutely declined to proceed, the only order that could be made against him would be, that he should produce the papers for the use of the plaintiff, *Commerell* v. *Poynton*. (*a*) Papers, on which a solicitor has a lien, are never taken out of his hands, till his bills of costs are paid; at least, the sum due to him must be paid into Court, before he is required to part with the papers.

The LORD CHANCELLOR.

A solicitor cannot assign over a client, or a client's business. I formerly thought that these bargains, by which one solicitor assigns his business over to another, were con-

(*a*) 1 Swanst. 1.

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trary to public policy. The Court of King's Bench entertained a different opinion, on the ground that the client could say, "my business shall not be so assigned." I doubt, however, whether the Court, in coming to such a conclusion, recollected sufficiently the situation in which a client generally is, when a recommendation, purchased with money, is thus urged upon him.

I look upon Mr. *Raphael* as having dissolved the connection of solicitor and client; for it is not enough, that he was willing to superintend the plaintiff's business. Now, where the solicitor discharges himself, the rule is quite different from what it is where the solicitor is discharged by the client. I remember, the Court of Common Pleas held, that an attorney, if he refused to go on with the business, should not recover for the part which he had done. As to requiring the party to pay the amount of the costs into court, that is a term which I will not impose; for it is a term with which not one half of the suitors could comply. So far as the use of papers is concerned, the suitor, when his solicitor discharges himself, must have his business conducted with as much ease and celerity, and as little expence, as if the connection of solicitor and client had not been dissolved.

Mr. *Treslove*, on behalf of Mr. *Raphael*, now offered, that Mr. *Raphael* should proceed with the cause.

The LORD CHANCELLOR.

How can Mr. *Raphael* now offer to proceed with the cause? He has assigned his business. The papers must be given up to Mr. *Winter*, on his signing a receipt for them, and undertaking to hold them, subject to Mr. *Raphael's* lien.

The Order made was as follows, " His Lordship doth order that Mr. *John Raphael*, the late solicitor in this cause for the plaintiff, do, within a week, deliver, upon oath, to *James Winter*, the present solicitor in this cause for the plaintiff, all the proceedings in this cause, and all such deeds, evidences, papers and writings whatsoever, as have come into the possession or custody of the said *John Raphael*, belonging to the plaintiff, and which relate to this cause; the said *James Winter* giving a receipt to *John Raphael* for the said deeds, evidences, papers, and writings, and undertaking to hold the same, when so delivered to him, subject to the lien of *John Raphael*, for the amount of what shall be found due to him upon the taxation of his bills of costs, and until such amount shall be paid to *John Raphael*: and, the plaintiff submitting to pay to *John Raphael* what shall appear to be due to him on taxation of his bills of costs delivered, it is ordered, that it be referred to the Master to tax the said bills of costs, &c." with the usual directions.

Reg. Lib. 1823. A. 151, 152.

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AT THE ROLLS.

November 29.

FERRAND *v.* PELHAM.

After a plea overruled, an order for time to answer, obtained as of course, is irregular,

TO an amended bill of revivor and supplement, the defendant, having obtained an order for a month's time to plead, answer, or demur, not demurring alone, put in a plea alleging, that the original cause, which the bill sought to revive, had become abated in 1805, and that no proceedings had since been had in it. On the 3d of *November*, the plea was over-ruled by the *Vice-Chancellor*.

The defendant then obtained as of course, by petition at the Rolls, an order for a month's time to answer.

The plaintiff now presented a petition praying that the order might be discharged as irregular.

Mr. *Skirrow* for the petition, cited *Jones* v. *Saxby* (*a*), and referred to *Griffith* v. *Wood* (*b*).

Mr. *Pepys*, contra, contended, that the practice always had been, that a defendant might obtain, as of course, one order for time to answer, after a plea or demurrer overruled.

Mr. *Lovat*, *amicus curiæ*, referred to the case of *Trim* v. *Baker* (*c*), as deciding, that, after a demurrer was over-ruled, it was not of course to obtain an order for time to answer.

Mr. *Pepys* answered, that, even if such a rule had been laid down by the *Lord Chancellor* in the case of a demurrer over-ruled, it did not apply to a plea. A plea was,

(*a*) 1 Swanst. 194. (*b*) 1 Ves. & B. 541. (*c*) See supra, 253.

in many respects, considered as an answer, and had nothing in common with a demurrer.

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The MASTER OF THE ROLLS.

We have, in this branch of the court, many precedents of orders for a month's time to answer, granted upon petition of course, after a demurrer or plea over-ruled; and I doubt whether the *Lord Chancellor* was aware of the existence of these authorities, when the point now in discussion was brought before him. However, I must yield to the authority of Lord *Eldon's* decision, even if, when he made it, he had not the full series of authorities before him.

Let the order be discharged but without costs; and let no proceedings be taken against the defendant till after next seal, in order that he may have an opportunity of making a special application for time.

The LORD CHANCELLOR afterwards gave the defendant two successive orders for time to answer; one for three weeks, and another for a fortnight.

Reg. Lib. 1823. A. 230—389.

GAREY *v.* WHITTINGHAM.

AT THE ROLLS.
November 29.

A party, who is served with a petition, but who has no interest in the order to be made upon it, is not entitled to the costs of appearing on the hearing of that petition.

THE bill was filed by a person entitled in remainder to a residue: the defendants were Mrs. *Whittingham*, to whom the interest of the residue was given during her life to her separate use,—her husband,—and the executors.

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Mrs. *Whittingham*, who had answered separately from her husband, presented her petition, praying that the dividends of the fund in court might be paid to her; and an order to that effect was made.

Mr. *Belt* appeared for the husband, who had been served with the petition, and asked for costs.

Mr. *Agar*, contra, submitted, that, as the husband had no interest in the prayer of the petition, and was served merely as a party in the cause, he ought not to have appeared, and, therefore, ought not to be allowed the costs of his appearance.

It was stated, by many of the bar, to be the practice, both before the *Lord Chancellor* and the *Vice-Chancellor*, to give costs to parties who were served, even though it was not necessary to have served them, or that they should appear.

The MASTER OF THE ROLLS.

If a person is served whose appearance is not necessary, and he chuses to appear merely to ask for costs, it is the established practice here not to give him his costs. The rule is not of my making. When I first came to this seat, I thought the point of so much importance, that I consulted Sir *William Grant* upon it. He informed me, that, in his time, the rule was as I have stated; and I have followed the practice which my predecessors have established, as being the most useful to the public. A contrary practice would produce an enormous and unnecessary expense.

The order recited—" Counsel for the petitioner and for the defendant *John Felix Whittingham* and the plaintiff this day attending, no one attending for the other parties, although they were duly served with a copy of the said

petition, and his Honour's order made thereupon:"—and it directed, that the dividends should be paid to Mrs. *Whittingham*, and that she should pay unto the plaintiff the costs of the application.

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GAREY v. WHITTINGHAM.

Reg. Lib. 1823. A. 104.

In many other cases, the *Master of the Rolls* refused costs to parties whose appearance was not necessary, but who, having been served, chose to appear (*a*).

(*a*) After the death of Sir Thomas Plumer, the practice on this point seems to have varied.

GRETTON *v.* LEYBURNE.

AT THE ROLLS.

December 1.

A bill of costs, where the amount of it has been settled between the solicitor and client, and part of it has been paid and security given for the remainder, will not be ordered to be taxed, merely because it contains charges which would be disallowed on taxation.

Semble, an order obtained as of course or the taxation of a bill of costs, which has been settled and paid, will not be discharged for mere irregularity, without any discussion of the merits, if the petition, seeking to discharge that order, enters into the merits of the case.

MR. *Chippendale* had been Mr. *Gretton's* solicitor in a suit, which commenced in 1809, and ended in 1817: Mr. *Chippendale* and Mr. *Gretton* had likewise cash transactions with each other. On the 7th of February 1818, Mr. *Chippendale* delivered his bill of costs, amounting to 2,005*l.* On the 18th of March following, a meeting took place between Mr. *Chippendale* and Mr. *Gretton* Jun., who, his father being then very far advanced in years, acted as his father's agent. At that meeting a balance of 768*l.* was ascertained to be due to Mr. *Gretton*, on the cash transactions; and, debiting him with the amount of the bill of costs, the balance due from him was stated at 1,236*l.* 2*s.* 1½*d.* The account was subscribed:

"Balanced and settled this day by us,
William Chippendale,
William Gretton, for *John Gretton* and self."

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In July, a correspondence took place between Mr. *Gretton* Jun. and Mr. *Chippendale*, in which the former objected to items in the bill, and required to have it examined, and the latter expressed his willingness that it should be looked into. Afterwards *Chippendale* offered to reduce the bill to 1,200*l.*: his offer was accepted; and, on the 1st of August, the following memorandum was indorsed on the account, and signed by both parties, "The balance due on this bill was 1,236*l.* 2*s.* 1½*d.*, and, by an inspection this day, was reduced to 1,200*l.*"

In May 1819, 600*l.* was paid by Mr. *Gretton*; and four bonds of the father and the son, each for 150*l.*, were given to *Chippendale*, payable respectively at the end of one year, two, three, and four years. Three of those bonds were paid; but the fourth was not paid. On the 24th of April, 1823, an order as of course was obtained for the taxation of *Chippendale's* bills.

Chippendale now presented a petition, going into the merits of the case, and praying that the order of the 24th of April might be discharged.

The affidavits of three professional men stated, that the bill contained many improper charges: and particular objectionable items were specified.

Mr. *Sugden* and Mr. *Norton*, for the petition, contended, that, without going into the merits, it was enough to say, that the bill had been settled and paid; and, therefore, an order to tax it, obtained as of course, was irregular. Even if, upon a petition regularly heard, the client could succeed in having the bill taxed, still this order must be discharged, *Clutton* v. *Pardon* (*a*).

The MASTER OF THE ROLLS.

A party, who presents a petition going into the merits

(*a*) Sup. 301.

of a case and desiring to have an order discharged on the ground of those merits, and who files affidavits as to the merits, which call forth affidavits in answer, cannot be permitted to say "I have a preliminary objection in point of form, which makes it unnecessary to go into the substance of the case." If the solicitor meant to rely on the alleged irregularity of obtaining such an order, as of course, he ought to have presented a short petition confined to that point.

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Mr. *Sugden* and Mr. *Norton*

Insisted on the settlement of the bill of costs, by a person duly authorized to act for Mr. *Gretton*, and the long acquiescence in that settlement, and also on the payment that had been made, and the securities that had been given, in pursuance of it. Under such circumstances, it was in vain to point out particular items of charge, which might be too high, unless the over-charge was so gross as to amount to fraud.

Mr. *Horne* and Mr. *Rose*, contra.

The client was not personally a party to any one of the dealings, which the Solicitor relies upon as a bar to the taxation of his bill.

The transaction, which took place on the 18th of March, 1818, does not amount to a settlement; for there was at that time no examination of the bill of costs, nor production of vouchers, though an account was settled in which that bill formed an item: and, accordingly, in the subsequent correspondence, the demand for costs is treated as still open to examination. The bill, therefore, was an unsettled bill on the 31st of July; and the deduction of a gross sum from it on the 1st of August, by which the balance was reduced to 1,200*l.*, but not accompanied by any

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examination of items, cannot give it a more binding character. The subsequent payment and the delivery of the bonds were extorted by the apprehension of arrest. Nothing, therefore, has occurred, which will preclude the taxation of the bill, if we can shew particular items of improper charge. We have done so; the evidence which we have given of the extravagance of many of the charges contained in the bill of costs, is decisive: and, in cases of this kind, a court of equity infers fraud from extravagance of charge.

The following cases were cited: *Langstaffe* v. *Taylor* (*a*). *Plenderleath* v. *Fraser* (*b*). *Crossley* v. *Parker* (*c*).

The MASTER OF THE ROLLS.

It was contended that the order for taxation ought to be discharged on the simple ground, that it had been obtained as of course, after the bills sought to be taxed had been settled, and payment of them either made or secured. I thought it more consonant to justice, as both parties had entered into the merits, to hear those merits just as if a new petition for taxation had been presented, and finally to determine the point in dispute. If the present petitioner had failed upon the merits, and I had thought it right upon the affidavits before me to make a new order refering his bills for taxation, it would not have followed, that the former order might not have been discharged at the same time that such new order was made.

On those merits, this does not appear to me to be a case in which the party is entitled to have the bill taxed. The right of a client to have his solicitor's bill taxed, though a right which is to be favoured in a court of justice, may be waived; and the whole point, in many of the cases, is,—do the circumstances of the dealings between the parties amount to a waiver of that right? Work and labour done by an attorney is like work and

(*a*) 14 Ves. 263. (*b*) 3 V. & B. 174. (*c*) 1 Jac. & W. 460.

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labour done by any person of a different class; there is no particular rule for judging what is final settlement with respect to a bill of costs more than in any other species of demand,—save only that the court throws round the client a considerable degree of protection, so that none of the ordinary acts, which in common matters might operate as a sort of settlement, shall preclude the client from having the items of the charge examined.

The bill of costs, though not delivered till *February* 1818, commenced in 1809; the solicitor and the client had other dealings, and there was a cash account depending between them. In *March* 1818, a settlement took place of the cash transactions, when, on them, a balance of about 768*l.* was found to be due to *Gretton*. Against this, there was a set-off of the bill of costs, charges, and expences, amounting to about 2,005*l.*, which had been delivered some weeks before. The two accounts are settled together; a balance of 1,236*l.* is ascertained to be due to *Chippendale;* and Mr. *Gretton*, Jun. signs the account, ascertaining this balance, as balanced and settled. Much has been said with respect to the advanced age of Mr. *Gretton*, who was then about ninety years old; but the settlement was made through an authorised agent; the son settled the account current, and there is no attempt to dispute it. If he was competent to settle the one, why should he not be competent to come to a settlement with respect to the bill of costs?

It is contended, that what took place in March 1818, cannot be regarded as a settlement of the bill of costs, because it had not been preceded by a regular examination of the items, and because it was followed by communications between the parties, which shewed that they considered the charges as still the subject of discussion. But, in the first place, an interval had elapsed from the delivery of the bill long enough to enable the client to look into

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the reasonableness of the charges; and, next, supposing that Mr. *Chippendale* voluntarily let him in to examine the account, what is the effect? Mr. *Gretton* has an opportunity given him to examine the items, and to consult professional men: and the result is, that he and his solicitor come to a compromise; 36*l.* is deducted; and it is agreed that the balance shall be settled at 1,200*l.* It was argued, that the deduction of 36*l.*, being made in gross, and not on account of particular items, could not be regarded as a settlement. But,—when objections are taken to an account, and one party proposes, and the other party consents to the proposal, that, in order to avoid the discussion of particular items, a gross sum shall be deducted—when the deduction is accordingly made, and the balance ascertained to be of a given amount;—the account, which has been so dealt with, must be considered as settled.

The transaction does not stop at this point. In May 1819, after *Gretton* had had full time to consider what had been done, bonds, payable by instalments, at distant periods, are given for the balance due to *Chippendale*. It is said, that this was done to prevent an arrest; such an allegation may be made in every case; and there is here no evidence that Mr. *Chippendale* used any threats. Nay, three of the bonds are paid; and it is only when the last becomes due, that an application is made to have the bills taxed.

Probably many of the items in the bills would be disallowed by the Master; but that is not enough, after such dealings, to give the party a right to have the bills taxed. Items which would be disallowed, do not amount to that fraud, which must be made out, in order to subject to taxation bills that have been so settled.

The order for taxation was discharged with costs.

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BARKER *v.* LEA.

At the Rolls.
December 2.

A testator bequeaths the residue of his property to his nephews and nieces on their respectively attaining twenty-five, with a direction that his trustees shall, in the mean time, apply the profits to their maintenance; but in case of the death of any of them unmarried and without issue, he gives the shares of those so dying unto the survivors equally, to be paid at the same time with their original shares; first a nephew and then a niece die, under twenty-five, unmarried and without issue: the whole residue is divisible among the survivors who attain the specified age, and the niece does not, upon the death of the nephew, acquire, under the clause of survivorship, a vested interest in her proportional part of his share.

A TESTATOR by his will, after giving legacies to his brothers and sisters therein named, bequeathed all the residue of his estate, as well real as personal, "unto all and every the child or children of my brothers and sisters aforesaid who shall be living at the time of my decease, on their, his, or her respectively attaining the age of twenty-five years, in equal shares; but in case of the decease of any of the aforesaid brothers and sisters, leaving issue born in wedlock, then the child or children to have and enjoy the same share as if the parent had been living at the time of my decease; the principal of all such monies to be employed by my said executors and trustees, and the survivors of them in such way, as they, in their discretion, think most advantageous, and the profits and produce of my said residuary property to be in the mean time laid out and applied by my said executors and trustees, and the survivor and survivors of them, for and towards their maintenance, education, and support equally, until they respectively attain the age of twenty-five years as aforesaid: and in case of the death of any or either of them unmarried and without issue, then I give and bequeath the part or share of him, her, or those so dying without issue, unto the survivor and survivors of them equally, share and share alike, and to be paid to them respectively at the same time along with their own original shares."

Richard Bousfield Sims, one of the class of children to whom the residue was given, died unmarried and without issue before he attained twenty-five; and afterwards *Sophia Maria Bousfield*, another of that class of children, died under twenty-five, unmarried and without issue.

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The only question argued, was, whether that portion of the share of *Richard Bousfield Sims*, which, on his death, survived to *Sophia Maria Bousfield*, became a vested interest in her, and was transmitted to her personal representative; or whether, upon her death, the whole survived, and not merely her original share, to the other residuary legatees.

Mr. *Horne* for the plaintiffs, argued, that the whole of the fund continued divisible among the surviving nephews and nieces, and that no interest, whether original or accrued, veeted in any of them till they attained twenty-five.

Mr. *Shadwell*, contra.

In *Pain* v. *Benson*(*a*), Lord *Hardwicke* says, "where a man gives a sum, suppose 1,000l., to be divided among four persons as tenants in common, and that, if one of them die before twenty-one or marriage, it shall survive to the other: if one dies and three are living, the share of that one so dying will survive to the other three; but if a second dies, nothing will survive to the remainders but the second's original share, for the accruing share is as a new legacy, and there is no further survivorship." And, though in that case he decided that the accrued, as well as the original, shares went over, he proceeded upon the manifestation of intention which appeared from the particular provisions of the will. The words, "in case of the death of one of them unmarried and without issue, I give the share of him, her, or those so dying unto the survivors equally," are a direct and immediate gift to the persons, who, at the time of such death, answer the description of "survivors." The share, therefore, which, upon the death of the nephew, accrued to *Sophia*, was a vested interest in her; and there are no words, which, upon her

(*a*) 3 Atk. 80.

death, could carry it away from her personal representatives, and over to the other nephews and nieces.

Mr. *Wingfield* and Mr. *Wray*, for the trustees.

Budge v. *Barker* (*b*), *Worlidge* v. *Churchill* (*c*), *Ferguson* v. *Dunbar* (*d*), and *Wilmot* v. *Wilmot* (*e*), were cited.

The MASTER of the ROLLS.

Where distinct legacies are given with survivorship, the general rule is, that the clause of survivorship, unless extended by particular words, attaches only to the original shares and does not affect the accruing shares, which therefore become vested in the individuals who are the survivors for the time being. That rule is recognised by Lord *Hardwicke*, in *Pain* v. *Benson*; and subsequent cases, though they have introduced exceptions, have not broken in upon it. The principal exception is, where the disposition is, not of separate legacies, but of one aggregate fund, which the testator meant should remain an aggregate fund, and should not be broken into fragments, if some of the persons, to whom interests in it were given, happened to die.

Now, in this case, the testator is disposing of an aggregate fund; he speaks of the residue as one mass, and there is nothing in the will which leans towards the idea of separate subdivision. He directs his trustees to "employ the principal of all such monies in such way as they think most advantageous, and to apply the profits towards the maintenance of the children, until they respectively attain twenty-five;" plainly intimating, that, notwithstanding

(*b*) Ca. Temp. Talb. 124.
(*c*) 3 Bro. C. C. 465.
(*d*) 3 Bro. C. C. 469. in the note.
(*e*) 8 Vesey 10.

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intermediate deaths, the aggregate fund was to remain entire, till it were seen who were the persons entitled to it. If any child died under twenty-five, there was nothing which, correctly speaking, could be said to go from that child to the survivors; for, in that event, such child was not entitled to any interest in the fund. After attaining twenty-five, the child took a vested interest in his share, and such share could not afterwards survive. My opinion, therefore, is, that the survivors take the whole of the residue.

The only objection to this construction is, that it gives no effect to the words, "In case of the death of any or either of them unmarried, and without issue, then I give or bequeath the part or share of him, her, or those, so dying without issue, unto the survivor and survivors of them, equally share and share alike, and to be paid to them respectively at the same time along with their own original shares." If the first part of the will had been ambiguously expressed, I should have thought that these words afforded a strong ground for contending that the original shares were vested interests, though not payable till twenty-five. But the words "on their, his, or her respectively attaining the age of twenty-five years," are annexed to the substance of the bequest. The gifts were contingent; and, in the events which have happened, nothing vested in *Richard Bousfield Sims* and *Sophia Maria Bousfield*.

The Decree declared "That the original share of *Sophia Maria Bousfield*, in the residuary estate of the testator, and also the share which survived to her on the death of *Richard Bousfield Sims*, did, upon her death, survive to, and become divisible among, the surviving nephews and nieces of the testator, who were living at the time of his death."

Reg. Lib. 1823. A. 123.

1823.

JAMES *v.* PARNELL.

AT THE ROLLS.
December 2.

Proof of the handwriting of an attesting witness to a will, received under particular circumstances in order to found a decree establishing the will.

THE only question in the cause was, whether the will was so proved, that the Court could establish it.

The testator had been dead about twenty-five years.

Two of the attesting witnesses proved the execution of the will, and the hand-writing of the third attesting witness. That witness was described as a servant of a Mr. *Parnell;* and, upon inquiries being made of a nephew of Mr. *Parnell,* who had succeeded to the property of that gentleman, the answer was, that nothing had been heard of the witness for a great number of years. No inquiry had been made of the family of the witness, as it was not known who his relations were.

Mr. *Shadwell,* Mr. *Roupell,* and Mr. *Wakefield,* for the different parties.

Powell v. *Cleaver* (*a*), Lord *Carrington* v. *Payne* (*b*), *Bernett* v. *Taylor* (*c*), were cited.

The MASTER OF THE ROLLS was of opinion, that the proof was sufficient, and made a Decree declaring the will to be well proved.

(*a*) 2 Bro. C. C. 503. (*b*) 5 Vesey 404. (*c*) 9 Vesey, 381.

RONALDS *v.* FELTHAM.

AT THE ROLLS.
December 2.

A testator, having first directed all his debts to be paid, bequeaths all his copyhold estates, and all his property whatsoever to his wife during her life, and after her decease to his surviving children, and appoints *A.* and *B.* his executors: The debts are charged on the copyhold estate.

THE last will of *George Sponge*, dated on the 29th of October, 1821, and not attested so as to pass real estates, was in the following words:

"First, I direct all my just debts and funeral expenses to be fully paid and satisfied; I give and bequeath unto my wife, *Elizabeth Sponge*, all my copyhold, freehold, and leasehold estates, lying and being in *Egham*, with every appurtenance thereunto belonging, and all my property, stock in trade, furniture, and book-debts whatsoever and wheresoever, to hold to the said *Elizabeth Sponge* for her natural life, and, after her decease, the said property and estates to be divided between the surviving children of me *George Sponge*. I nominate, constitute and appoint *George Feltham* and *Joseph Sadler*, executors in trust of this my will."

The personal property of the testator was not sufficient to pay his debts. He had no freehold estates; but he had a leasehold which had been sold by his executors for a trifling sum, and a copyhold messuage of the value of about 800*l*.

The bill, filed by the creditors, prayed, that so much of the real estate might be sold, as should be necessary for the payment of the testator's debts.

The devisees insisted, that the debts were not made a charge on the copyhold.

Mr. *Purvis*, for the creditors, cited *Clifford* v. *Lewis* (*a*), and *King* v. *Dennison* (*b*).

(*a*) 6 Mad. 33. (*b*) 1 Ves. & Bea. 260.

Mr. *Jeremy*, for the devisees, cited *Williams* v. *Chitty* (*c*), and *Powell* v. *Robins* (*d*). The words were not sufficient to charge the real estates in any cases; least of all, could they charge a copyhold, which was specifically devised.

Mr. *Ludlow*, for the executors.

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If the disposition of the property is to be construed in the way contended for by the devisees, no fund would be left for the payment of the debts; for the bequest to the wife and to the children comprises every thing that belonged to the testator. He must have meant them to take the whole, subject to the payment of his debts; for, if that was not his purpose, what part of the property did he mean them to take, so subject? He has blended all his real and personal estate into one fund, which he gives to his wife for life, and after her death, to his children; but he has previously directed that his debts should be first paid. Until these debts were paid, it could not have been his intention that the subsequent disposition should take effect.

It was said in the argument, that the word "first," in this will was nothing more than the ordinary technical form of introductory words. In reference to that suggestion I have to observe, that here it is not followed by other words denoting succession, such as secondly, thirdly, &c.

The copyhold is charged with the payment of debts.

(*c*) 3 Ves. 545. (*d*) 1 Ves. 209.

END OF PART III.

REPORTS

OF

CASES

ARGUED AND DETERMINED

IN THE

HIGH COURT OF CHANCERY.

COMMENCING IN THE

SITTINGS BEFORE MICHAELMAS TERM,

3 Geo. IV. 1822.

ROLLS.

1823.

November 25.

COLLYER *v.* DUDLEY.

If an agent does not render his accounts within a reasonable time, he must bear the costs of a suit instituted to have the accounts taken; and it will not be any excuse for him, that he offered to pay on account a gross sum, which, it turns out, would have covered all that was due from him.

THE bill was filed by one of two executors, praying an account against the Defendant *Dudley*, who had been the solicitor and agent of the testator. The other executor, having declined to concur in the suit, was made a co-defendant.

The testator died in 1816; and from that time frequent applications had been made to *Dudley* to render his accounts: but no accounts were rendered; and the only reason assigned for the delay was the pressure of business. In 1821 the bill was filed; before the answer was put in, *Dudley* offered to pay the executors 500*l.* on account of what might be coming due from him; and on the result of the account, as afterwards taken in the Master's office, it appeared that 500*l.* was fully equal to the sum for which he was accountable at the time of the offer made.

1823.

COLLYER v. DUDLEY.

The only question was as to the costs of the suit.

The MASTER OF THE ROLLS.

Any person, and more especially a professional gentleman, who places himself in the situation of an agent collecting and disbursing monies, ought to be ready with his accounts. Suspense as to the actual state of the balance is most injurious to the principal. For upwards of four years repeated applications were made to Mr. *Dudley* for his accounts; but no accounts were rendered. It is no answer to this case of neglect and delay, that he offered to pay on account a gross sum, which, it now appears, would have covered all that was due from him; for, besides that the offer was not made till after the bill filed, the executors had a right to have the accounts rendered to them, as well as the balance paid. The delay of Mr. *Dudley* rendered the suit necessary; and he must pay the Plaintiff's costs.

The executor, who is a co-defendant, cannot have his costs; he ought to have concurred as a Plaintiff.

1823.

SUMNER *v.* POWELL.

December 5.

THE facts of this case are fully stated in the report upon the hearing of the cause before Sir *William Grant*, by whom the bill was dismissed. (*a*) The Plaintiff having appealed from the decree dismissing the bill,

The representative of a deceased partner, the account between him and the partnership being at the time unsettled, agrees with the surviving partners to assign to them all his interest in the concern, upon being paid a certain sum of money, and having an indemnity against all claims upon the partnership; the assignment is executed, the money paid, and a joint covenant of indemnity given by the surviving partners: Held, that the covenant is not to be considered in equity as a joint and several covenant.

The LORD CHANCELLOR this day delivered the following judgment upon the appeal.

I have doubted much whether the decision of Sir *William Grant* in this case was right; but, upon considering the case, it appears to me at present that his judgment ought to be supported. The late Mr. *Sumner* was a partner in the banking-house of *Castell*, *Powell*, and Co.; that partnership from time to time admitted new members, and, during its existence, two gentlemen, being trustees of a sum of stock of between 5000*l.* and 6000*l.*, executed a power of attorney to the house, enabling them to receive the dividends upon the stock; the power of attorney, either from its being so intended by the parties, or from want of attention on their part, authorized a transfer of the stock; and the fact is, that *Powell*, one of the partners, did transfer the stock, and apply the money arising from the transfer to the use of the banking-house, from time to time leading the parties interested to believe that the stock was still standing in the names of the trustees, by paying them the dividends as they became due till the failure of the banking-house. Before that event happened the late Mr. *Sumner* died,

(*a*) 2 Mer. 30.

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SUMNER v. POWELL.

and the plaintiff became his personal representative. It is quite clear that under these circumstances, the banking-house being debtors by the receipt of the money arising from the sale of the stock, the trustees and *cestuique trusts* became entitled to proceed, not only against the surviving partners, but against the assets of the deceased partners, till their demand was made good. After the death of the late Mr. *Sumner*, the plaintiff, not wishing to continue in the concern, came to an arrangement with the surviving partners, by which he was to be paid two sums of 1500*l.* and 2750*l.*, and to have an indemnity against all claims upon the partnership, assigning to the surviving partners all his interest in the concern. How the accounts would have stood between the plaintiff, as the representative of the late Mr. *Sumner*, and the surviving partners, if this arrangement had not been come to I cannot tell; but such an arrangement as I have stated was made, and then, of course, if proper care had been taken, the plaintiff would have had not only an indemnity, but a full and effectual indemnity. The indemnity taken however was the joint covenant of the partners who remained in the concern, and not their joint and several covenant. Demand being afterwards made in this Court, it turned out that the plaintiff, as the representative of the late Mr. *Sumner*, was compelled to pay a considerable sum of money on account of the produce of the stock sold out, and by this bill he claims, against the representatives of the deceased partners, to be indemnified under the effect of the joint covenant. The case on his part was rested on the ordinary doctrine of this Court, that, where there has been an antecedent joint debt due from the parties to a joint obligation, this Court considers the obligation as joint and several, and pursues the assets of deceased debtors until the demand is satisfied. The *Master of the Rolls* was well prepared to give judgment in this

case, the subject being one of which he had acquired very extensive knowledge. What he says is, that where there is no antecedent debt or antecedent liability, a party taking a joint covenant or a joint indemnity must abide by it; that a court of equity gives no more relief in such cases than a court of law does; and that, there being in this case no antecedent liability to indemnify him, the plaintiff must abide by his joint covenant, and can only go against those against whom he has a remedy at law. The question is, whether it is so or not. I confess I have felt a strong opinion that it was difficult to distinguish this case from the case of antecedent debt, looking at the plaintiff as buying his indemnity by taking it in discharge of what was due to him from the partnership. The question will be therefore, whether the case is not reduced to this — that in order to get rid of all sorts of difficulties, the surviving partners said to the plaintiff, there is an account between us, take the 4250*l.*, take the indemnity, and let us have nothing more to do with it. If that was the case, it comes to the question which the *Master of the Rolls* has considered. That appears to me to have been the case, and therefore I do not see any ground to disturb this judgment. There can be no doubt in the world that if this covenant had been a joint and several covenant it would have done, and, therefore, any evil which might otherwise arise out of the case, may be avoided by the addition of a single word. I do not think that any case can be found, in which, where a joint obligation has survived, it has been carried into effect against the assets of a deceased obligor in a case of indemnity.

Decree affirmed.

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July 28, 29.
December 3.

COOPE *v.* TWYNAM.

Where sureties are bound by different instruments for equal portions of a debt due from the same principal, and the suretyship of each is a separate and distinct transaction, there is no right of contribution between them.

THE bill in this cause, amongst other things, prayed, that a bond, which had been executed by the plaintiff and *John Brice* deceased, for securing to the defendant *Twynam* the sum of 400*l.* and interest payable on the 24th of *December* 1814, might be delivered up to be cancelled, and for an injunction in the meantime to restrain proceedings at law upon the bond.

The principal case stated by the bill in support of the relief prayed respecting the bond was, that in *August* 1812, the plaintiff and *William Rogers* and *William Purdue Smith* respectively agreed to become security with the said *John Brice* for the payment to the defendant *Twynam* of such sum of money, not exceeding 1200*l.*, as *Brice* might be found indebted to *Twynam* upon the settlement of an account then depending between them; that it was agreed that such security of the plaintiff and *Rogers* and *Smith* respectively should be given by three several bonds payable, with interest, at different periods, that is to say, one bond from *Brice*, and *Smith* as his surety, for the payment of 400*l.*, and interest, on the 24th of *December* 1813; another bond from *Brice*, and the plaintiff as his surety, for the payment of 400*l.*, and interest, on the 24th of *December* 1814; and another bond from *Brice*, and *Rogers* as his surety, for the payment of 400*l.*, and interest, on the 24th of *December* 1815; that *Brice* and *Twynam* accordingly caused three several bonds to the effect aforesaid to be prepared, and that the plaintiff and *Rogers* respectively executed the bonds in which they were

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respectively named as sureties, but that *Smith* declined to execute the bond in which he was named as surety, or to carry the agreement with *Twynam* into effect. The bill charged, that the execution of the bonds was one entire agreement, and that as *Smith* did not execute the bond in which he was named as surety, the plaintiff was not bound by the bond which he had executed; And it further charged, that the bond executed by the plaintiff was executed by him upon the faith and expectation that *Smith* would execute his bond, and that *Brice* would thereby be relieved from the payment of the 1200*l.* to *Twynam* until the bonds should respectively become payable.

The defendant *Twynam*, by his answer, said that in *August* 1812 *Brice* was indebted to him in the sum of 1364*l.* or thereabouts, upon the balance of an account which was then depending between them, and that being pressed for payment of the balance, *Brice* proposed to give security for 1200*l.* part thereof, and offered as such security the three several bonds mentioned in the bill. He further said, he believed that the plaintiff and *Rogers*, each of them alone and separately from the other, agreed to become bound with *Brice* for the payment of 400*l.* to him, the defendant, without any reference to the settlement of accounts between him and *Brice*, and without the plaintiff and *Rogers* becoming sureties or liable for the default of each other, or of *Smith*; and he said he believed, that for the purpose of giving the aforesaid security, the plaintiff, for himself alone, and without any privity or connection with *Rogers* or *Smith*, agreed to join *Brice* in a bond for the payment of 400*l.* and interest on the 24th of *December* 1814; and *Rogers*, in like manner, agreed to join *Brice* in a bond for the payment of 400*l.* and interest upon the 24th of *December* 1815; but he said he did not

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believe that *Smith* ever agreed to join *Brice* in a bond for the payment of 400*l.* and interest on the 24th of *December* 1813, although, at the time when the other bonds were executed, *Brice* had induced him to believe that *Smith* would execute such a bond. He admitted that the three bonds were prepared by his solicitor, (who, he said, acted on that occasion as the solicitor of *Brice*) and that the plaintiff and *Rogers* respectively joined with *Brice* in the bonds in which they were named as co-obligors with him; and that *Smith* declined on his part to execute the bond in which he was named as co-obligor with *Brice*, and he insisted that, notwithstanding *Smith* did not execute that bond, the plaintiff was bound by the bond which had been executed by him. He denied that the execution of the bonds was one entire agreement, and said that he did not believe that the plaintiff executed the bond in which he had joined, upon the faith and expectation that *Smith* would execute the other bond, and that *Brice* would thereby be relieved from the payment of the 1200*l.* until the bonds should respectively become payable.

Mr. *Hart* and Mr. *Koe* moved for the injunction upon the merits confessed by the answer, and in support of the motion argued, that if the arrangement had been that *Brice* should give a bond for 1200*l.* with three sureties, and one of the sureties had declined to execute the bond, neither of the others would have been liable. That the same principle which applied to the case of an arrangement for three sureties joining the principal debtor in one bond, must apply to the case of an arrangement for three sureties joining the principal debtor in several bonds. That in each instance it was merely the case of three persons agreeing to become sureties for the principal debtor, and two only be-

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coming such sureties. They cited *Dering* v. *Lord Winchelsea* (*a*), and *Underhill* v. *Horwood.* (*b*)

Mr. *Sugden* and Mr. *Romilly* for the defendant, relied upon the fact of the sureties having entered into several and distinct obligations as an answer to the motion.

The LORD CHANCELLOR.

These cases of sureties depend upon nice distinctions in point of fact; *Dering* v. *Lord Winchelsea* settled, that if three persons became sureties for 12,000*l.*, each in a separate bond for 4000*l.*, there would be a right of contribution between them. That case was much doubted in *Westminster Hall* at the time it was decided; but I believe, upon consideration, it will be found to be quite right. In that case it was said by the sureties, we will each give a bond for 4000*l.*, but beyond that we will not be liable; it was held however that there was a liability between them as co-sureties. The present case depends upon the question, whether this was really a separate and distinct transaction, or the same transaction split into different parts. If the case of *Dering* v. *Lord Winchelsea* be right, and there was an agreement that *A.*, *B.*, and *C.* should become liable for 1200*l.*, each in a bond for 400*l.*, there would be a right of contribution between them; and then it would be a question whether, if the bonds were not given by all, they would be obligatory upon any? That would depend upon nice distinctions. It might be waived by subsequent transactions.

The LORD CHANCELLOR said, that he considered the bonds in this case as distinct obligations, and that it was impossible to apply the doctrine in *Dering* v. *Lord Winchelsea*. *December 8.*

Injunction refused.

(*a*) 1 Cox, 318. (*b*) 10 Ves. 209.

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ROLLS.
December 8.

HORNER *v.* SWANN.

A tenant for life, with a power of appointing the property by will to all or any of the testator's children, may release or extinguish the power.

WILLIAM HORNER being seised of the premises in question, subject to a joint power of appointment by him and his father, which was not exercised, devised to *Mansfield* and *Holloway*, and their heirs, all his real and personal estate, to hold the same unto the use of them, their heirs, &c. upon trust "to permit his wife, *Elizabeth Horner*, to use the same for her use, and for the purpose of maintaining his children until they should attain the age of twenty-one, and during her life in case she should so long continue his widow; and after her decease, then for such or all of his children and their respective lawful issue, and for such estates," &c., as his wife by her last will, or by any writing purporting to be her will, &c., should give, devise, and bequeath the same; and in default of such will, in trust for all and every his children living at his decease, or born in due time afterwards, and their heirs, &c. respectively, share and share alike; but if any of them died under twenty-one, without leaving lawful issue, then in trust, as to the share or shares of such child or children, for the survivors or survivor, and their respective heirs, &c., share and share alike. He subsequently directed, that, in case his wife should marry again, the trustees should convey and assign to each of his children successively, upon their respectively attaining the age of twenty-one, so much of the real and personal property as would amount to his or her equal share thereof; and in case any of his children should die after his wife should marry again, and leave lawful issue, he gave to the use of the said issue, their heirs, &c.

the same proportion of his real and personal property as their father or mother would have been entitled to, in case he or she had lived to attain twenty-one; but in case any of his children should die, after his wife should marry again, without leaving lawful issue, he directed that the share of such child should go to the survivor.

The testator left a widow and four children, all of whom attained twenty-one. One of them died subsequently, leaving her eldest brother her heir at law. The widow and the three surviving children contracted to sell the devised estate; and the bill was filed by them for the specific performance of the contract.

The purchaser, by his answer, submitted, that the Plaintiffs could not make a good title by reason of the widow's power of appointing by will, and of the contingent interests given to the issue of the children.

Mr. *Sugden* and Mr. *Sidebottom*, for the Plaintiffs.

The question is, whether the wife's power can be released or extinguished. It is not a power simply collateral, but is a power in gross, and is therefore capable of being destroyed by the donee; and the circumstance, that it is to be exercised in favour of a limited class of objects, namely, the children or their issue, does not alter its nature. The point, though once regarded as liable to doubt, must now be considered as settled; for it was expressly decided in *Smith* v. *Death*. (*a*)

Mr. *Cooper*, contra.

It has hitherto been considered a very doubtful question, whether such a power, as is here given to the

(*a*) 5 Mad. 371.

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widow, can be destroyed. "Lawyers of great eminence," says a text writer, "have been of opinion, that a power to a tenant for life, to appoint the estate among his children, is a mere right to nominate one or more of a certain number of objects to take the estate; and that, consequently, it is merely a power of selection, and cannot be barred by fine."(*a*) In *Jesson* v. *Wright* (*b*) Lord *Redesdale* says, "How can a man, having a power for the benefit of children, destroy it?" *Tomlinson* v. *Dighton* (*c*) leans towards the same conclusion. The solitary decision in *Smith* v. *Death* cannot be considered as determining the point so conclusively, that the Court will compel a purchaser to accept a title like this.

The MASTER OF THE ROLLS.

The *Vice-Chancellor* has given a solemn opinion upon the point; and his decision has been acquiesced in. I shall therefore follow it.

As to the second point raised by the answer, it was admitted, that, upon the true construction of the will, none of the limitations over could take effect, when all the children had attained twenty-one.

Decree for specific performance.

Reg. Lib. 1823. A. 466.

(*a*) Sugden on Powers, 73. 5th edition.

(*b*) 2 Bligh, 15.

(*c*) 1 P. Wms. 149.

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COURTOY *v.* VINCENT.

ROLLS.
December 10.

THE testator, by his will dated the 28th of *May* 1814, gave various annuities and legacies; and he requested "that his executors and trustees would pay all such annuities and legacies as aforesaid, clear of property tax and all expenses whatsoever attending the same."

A testator directs his executors and trustees to pay certain annuities and legacies, "clear of the property-tax, and all expenses attending the same;" the legacy-duty ought to be paid by the executors out of the assets of the testator, and the annuitants and legatees are entitled to receive the full amount of their respective legacies and annuities, without any deduction in respect of legacy-duty.

A petition was now presented, praying that the amount of certain sums, which the executors had retained out of the legacies and annuities, and applied in discharge of the legacy duty, might be paid to the annuitants and legatees.

Mr. *Horne* and Mr. *Knight*, for the petition, cited *Barksdale* v. *Gilliatt* (*a*) to show, that the executors ought to pay the legacy duty, and that the annuitants and legatees were entitled to receive the full amount of the benefits given them by the will, without any deduction in respect of legacy duty.

Mr. *Pemberton*, contra.

The words "clear of the property tax" cannot be construed to mean "clear of the legacy duty;" the property tax did not arise till the legacy duty was paid. The words "clear of all expenses attending the same" may mean either clear of all expense attending the property tax, or clear of all expense attending the legacies and annuities; but on neither construction can

(*a*) 1 Swanst. 562.

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the payment of the legacy duty be considered as an expense within the meaning of that phrase. The payment of the legacy duty is a burden thrown on the executor, and the act of parliament directs him to retain the amount out of the bequest.

The MASTER OF THE ROLLS was of opinion that the intention of the testator was to give the legacies and annuities free from legacy duty, and made an order accordingly.

Reg. Lib. 1823. A. 117, 118.

March 26.
August 2.
December 11.

Ex parte VAUGHAN, in the matter of EDRIDGE, a Lunatic.

Tenant of a lunatic's estate relieved against an ejectment founded on a forfeiture by breach of covenant to repair.

THIS was the petition of a tenant of the lunatic's estate, praying, that the committee might be restrained from proceeding in actions of ejectment, brought against the petitioner and his under-tenants, for the recovery of the demised premises, in pursuance of orders made in the lunacy.

The petition, after stating the leases to the petitioner, which contained the usual covenants on his part for payment of the rent, and for repairing the premises within three months after notice given by the lessor, and also a covenant by the lessor to find sufficient rough timber for the repairs, and a proviso for re-entry on nonpayment of the rent or breach of the covenants, proceeded to state, that notice having been given to the petitioner

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to repair the premises, he had applied to the committee to furnish rough timber for that purpose, but that no rough timber had ever been furnished; that the petitioner was nevertheless proceeding to repair the premises, which he had been prevented from doing before by the insolvency of an under-tenant; that the rent had been paid up to *Midsummer* 1822, and that the premises had not suffered any injury or become less valuable on account of the delay which had taken place in making the necessary reparations; that the actions of ejectment were brought on account of breaches of the covenants to repair, and of the provisoes for re-entry contained in the leases; and that the petitioner was advised that he had no valid defence at law to the actions; but that he was willing to make all the repairs upon the premises which should be thought necessary, and to pay all the costs which had been incurred on account of the breaches of covenant.

It appeared that the notice to repair was given in *January*, and that the petitioner's application for the timber was not made till *July*.

Mr. *Hart* and Mr. *Haldane* in support of the petition.

Admitting that courts of equity will not relieve against a forfeiture of this kind, your Lordship, sitting in lunacy, is bound to consider what, under the circumstances of the case, the lunatic himself would have done. The lunatic probably would not have taken advantage of the forfeiture. The only question is whether the tenant has entitled himself to indulgence. It will be most mischievous to the estates of lunatics to permit covenants of this nature to be acted upon with too much severity.

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Mr. *Shadwell*, against the petition, relied upon the general rule of courts of equity not to relieve against a forfeiture, except where it admitted of a compensation merely pecuniary, and cited *Reynolds* v. *Pitt*. (*a*)

The LORD CHANCELLOR.

There are forfeitures arising from breaches of covenant against which courts of equity cannot relieve, but which a judicious landlord would not take advantage of. The case which has been cited will not apply if the question is whether this is a case, in which the landlord, acting for himself, would not have taken advantage of the forfeiture; care must be taken not to get rid of a good tenant by being too strict.

August 2. The petition being mentioned again, the *Lord Chancellor* said, that where a man filed a bill for an injunction to be relieved against the effect of his own conduct, the Court would not, in general cases, relieve him; but that it would be an administration in lunacy extremely prejudicial to the estates of lunatics, if too hard measures were adopted with the tenants. His Lordship directed a statement to be made by affidavit what repairs were wanted to be done; and a surveyor's report having been shortly afterwards obtained upon the subject, the petition was ordered to stand over, and the repairs mentioned in the report to be completed in the meantime.

December 11. The repairs mentioned in the surveyor's report having been completed, it was ordered, that the petitioner should pay the committee of the lunatic's estate the rents of the several estates and premises in the possession of the petitioner belonging to the lunatic up to

(*a*) 19 Ves. 134.

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Michaelmas last, together with interest upon the rents of the premises for the recovery whereof actions of ejectment had been brought, at the rate of 5 per cent. per annum, from the period at which such rents were reserved and made payable by the several leases granted to the petitioner; that the petitioner should also pay the committee of the lunatic's estate, and the next of kin of the lunatic, all the costs charges and expenses which they had incurred, or been in any manner put unto, in consequence of the nonperformance of the covenants as to repairs contained in the said leases, and of the several petitions and inquiry before the Master, and of the actions of ejectment mentioned in the petition, and of that application and consequent thereon, including the costs and charges of the several persons employed by the committee to survey and examine the premises, and the state and condition thereof; and thereupon it was ordered, that all further proceedings in the said actions of ejectment, or otherwise in respect of the said breaches of covenant, should be stayed.

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ROLLS.
December 11.

TOMLIN *v.* BECK.

A person, who is permitted by an executor to possess himself of part of a testator, and who, after the executor's death, and when there is no legal personal representative either of the testator or of the executor, retains the assets, and acts in the execution of the trusts of the will, is not *executor de son tort* to the original testator.

JOHN SOUTHWELL, by his last will, gave some small annuities, and bequeathed the residue of his property to his grandchildren. He died in 1763, leaving nine grandchildren; and his will was shortly afterwards proved by *John Court* and *John Beck*, two of the persons whom he had named executors. In 1799, the last of the annuities given by the will expired. *John Beck*, the survivor of the two executors, died, in 1800, intestate; and no letters of administration were taken out, either to him, or to *Southwell*. Before the expiration of the last of the annuities in 1799, *Beck*, the executor, being desirous (as the answer expressed it) to give up the trust, paid over the balance of *Southwell*'s assets, then in his hands, to his own son, the defendant *Beck*, who from that time acted in the execution of the testator's will, making payments to, and settling accounts with, the persons beneficially entitled.

The bill was filed in 1820 by *Tomlin*, one of *Southwell*'s grandchildren, against *Beck* the son, and against the personal representative of *Court*, in order to compel them to account for the assets of *Southwell* possessed by either of the executors, or, since their decease, by either of the Defendants.

It appeared from passages of the answer which were read, that, in 1810, the clear balance, divisible among the legatees, was 39*l.* 5*s.* Of this sum eight equal shares were paid to the persons respectively entitled, who thereupon executed a release of all their demands

in respect of their testator's estate. The ninth share, amounting to 4*l.* 7*s.* 2*d.*, was left and still remained in the hands of the Defendant's attorney, for the purpose of being paid over to *Tomlin*, whenever he chose to apply for it.

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Mr. *Wakefield*, for the Plaintiff, contended, that *Beck* the son, by having possession of the assets of *Southwell* in specie, both during the life and after the death of *Beck* the father, and by having affected to act in the execution of the trusts of the testator's will, and to do all which his personal representative ought to have done, and that too at a time when there was nobody filling the character of legal personal representative, had made himself *executor de son tort* to *Southwell*, and in that capacity was liable to render the account which the plaintiff sought; or if he was not *executor de son tort*, he had, at least, placed himself in the situation of a trustee, and, as such, ought to account.

It was not attempted to make out any case against *Court*'s personal representative.

Mr. *Horne* and Mr. *Duckworth*, for the defendant *Beck*.

The MASTER OF THE ROLLS.

This plaintiff can have no right to the relief prayed, unless the defendant is clothed with that character of *executor de son tort*, in respect of which the account is sought. Now, I apprehend, that there cannot be an *executor de son tort* constituted by intermeddling with the assets of a testator, when there is a rightful executor acting in the administration of those assets. An *executor de son tort* can be only where no person is clothed with

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the character of rightful executor.* If a stranger possesses himself of any part of the assets in the lifetime of the rightful executors, the only effect of his intermeddling is to create a privity between him and those who have the legal interest in the estate, and to make him responsible to them. Were the mere possession of assets to constitute a man *executor de son tort*, there might be, at one and the same time, both a rightful executor and an *executor de son tort* — the former deriving his title from the will which he had proved — the latter clothed with his character by virtue of his having part of the assets in his hands; and if portions of the effects of the deceased could be traced into the possession of twenty or more persons, each of them would, upon that principle, be an *executor de son tort.*

Though *Beck*, the father, some time before his death, handed over the residue of the assets to his son, he could not make an assignment of the executorship, or devest himself of his own responsibility; and if there had been twenty individuals employed by him, who had received and acted in the administration of the assets, they would have been accountable to him, and he, to the estate. The defendant's possession of the assets having taken place in the lifetime of his father, he must, if he ever was *executor de son tort* to *Southwell*, have been so during the life of the rightful executor. It is clear, therefore, that he never was in any manner clothed with the character of executor. He was merely an agent,

* *Anonymous*, 1 Salk. 313. If *H.* get goods of an intestate into his hands, after administration is actually granted, it does not make him executor of his own wrong; but if he get the goods into his hands before, though administration be granted afterwards, yet he remains chargeable as a wrongful executor, unless he delivers over the goods to the executor before the action brought, and then he may plead *plene administravit.*

who, at the executors' request, took upon himself the active duty of administering the balance of this small estate. That does not make him accountable for all the unadministered assets of *Southwell*.

With respect to his responsibility as agent (not to mention that the person to whom he would be so responsible — the rightful representative of *Southwell* — is not before the Court), it appears from the passages of the answer which have been read, that the plaintiff's share of the balance, received by the defendant, exceeds 4*l*. by a few shillings, and that the other shares have been paid to the persons entitled; so that if the bill be considered as brought against an agent for an account of monies received by him, it is, in truth, filed for a sum under 5*l*.

Add to this, that the plaintiff's right to any relief, which he can now claim, accrued in 1799; and he has thus suffered more than twenty years to elapse, before he filed his bill.

Upon these grounds — first, of the plaintiff having failed to prove, that the defendant fills that character in which the account is sought against him — secondly, of the quantum of demand being below the dignity of the Court — and, thirdly, of the length of time which has elapsed since the plaintiff's right of suit arose, — this bill must be dismissed with costs. In the taxation of costs the defendant will give credit for the 4*l*. 7*s*. 2*d*., which the answer admits to be due to the plaintiff.

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Rolls.
December 12.

BURCHETT *v.* WOOLWARD.

A testator directs that his executors pay to *A. B.* a yearly sum as wages, so long as she should continue in his wife's service, and if she continued in such service, that the payment should be made to her quarterly, free from all deductions, to cease in case she should leave the service of his wife, until the decease of his wife. The testator's wife died in his lifetime. Held, that *A. B.* was entitled to the annuity during her life.

GEORGE CUMMING by his will devised all his estate and effects, real and personal, to trustees, who were also his executors, upon trust to sell the same, and, after payment of certain legacies, to invest the proceeds in the public funds, and pay one moiety of the yearly dividends to his wife *Mary Cumming* during her life. Subject to the wages and annuity thereinafter mentioned, they were to lay out the remaining dividends, or a competent part thereof, in the genteel and respectable maintenance and education of *William Burchett* and *Jane Burchett*, the son and daughter of *Mary Burchett*, who then lived in his service, during the lifetime of his wife. He then directed, that "out of the last-mentioned share they should pay to *Mary Burchett* the yearly sum of 20*l.* as wages, as long as she should continue in the service of the testator's wife; and if *Mary Burchett* should so continue in such service at such wages, the testator's will was, that the sum of 20*l.* should be continued and paid to *Mary Burchett* quarterly and free from all deductions as an annuity, to cease in case she should leave the service of his said wife until the decease of his said wife as aforesaid." The surplus of the dividends of this moiety, and, after the decease of his wife, the first-mentioned moiety, were disposed of upon trusts for the benefit of *William Burchett* and *Jane Burchett*.

Mary Cumming died in the testator's lifetime. *Mary Burchett* remained in her service down to the time of *Mary Cumming*'s death, and was in the testator's service at the time of his death.

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The question was, Whether *Mary Burchett* was entitled to the annuity of 20*l.* during her life.

Mr. *Horne* and Mr. *Roupell* for *Mary Burchett*, who was one of the plaintiffs, contended that the testator had bequeathed to *Mary Burchett* an annuity, subject to a condition; that the condition here annexed to the gift had been rendered impossible by the act of God, namely, by the death of the testator's wife in his lifetime; and, therefore, that *Mary Burchett* was entitled to the annuity without qualification.

Mr. *Wakefield*, contra, argued, that the testator had merely fixed the amount of remuneration which was to be paid to *Mary Burchett* so long as she should continue in his wife's service, and that, upon the fair construction of the will, the payment was to continue only till his wife's decease.

The MASTER OF THE ROLLS.

The question is, Whether the 20*l.* a-year was intended to be wages, to continue so long as *Mary Burchett* should act as servant to the testator's wife, as a remuneration for her attendance; or whether it was to be an annuity during the life of *Mary Burchett*, coupled with a condition that it should be forfeited, if she did not, during his wife's life, continue to be her servant.

From the first part of the will it is clear that Mr. *Cumming* did not consider *Mary Burchett* as a person who stood simply in the situation of a servant: he evidently had a regard for her family; for he makes her children his residuary legatees, and provides for their maintenance. When he comes to the bequest to *Mary Burchett*, he gives her the "yearly sum of 20*l.* as long

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as she should continue in the service of his wife." Here the yearly payment is characterised expressly as wages, and the payment is to continue only while the service continues. Then there follows, the direction that, if *Mary Burchett* should so continue in such service, the 20*l.* should continue to be paid to her quarterly as an annuity. These words seem to import that he meant to give her an annuity subject to a condition, and that, if she survived his widow, she was to have the annuity for her life; and the clause, " that the said wages and annuities are to cease, in case *Mary Burchett* should leave the service of the testator's wife until the decease of the wife," implies temporary cessation, and that, after the widow's death, the annuity was to be paid to *Mary Burchett.*

On the whole, therefore, the sound construction is, that the testator gave to *Mary Burchett* an annuity, subject to a condition of continuing in the service of his wife during the wife's life. The death of the wife in the testator's lifetime made the performance impossible; and, therefore, the annuity is not forfeited, but belongs to *Mary Burchett* during her life.

" Declare that *Mary Burchett* is entitled to an annuity of 20*l.* during her life."

Reg. Lib. 1823. A. 262.

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BETWEEN ALBERT GOLDSMID, LIONEL GOLDSMID, JESSE GOLDSMID, JAMES WILLIAM OGLE, and RICHARD LOVELL BROWNE, - PLAINTIFFS;

AND

ISAAC LYON GOLDSMID, TIMOTHY YEATS BROWN, DANIEL EBASON, ALEXANDER GOLDSMID, AARON ASHER GOLDSMID, MOSES ASHER GOLDSMID, JOHN LOUIS GOLDSMID, and HENRY GOLDSMID, . . DEFENDANTS.

ROLLS. *December* 12.

BENJAMIN GOLDSMID, by his will dated the 25th of *April* 1798, among other things, bequeathed to his executors the sum of 2000*l*., to be invested by them, in their joint names, in 3 per cent. Consolidated Bank Annuities. This stock, with the dividends thereon, was to be held by them upon trust for his wife, *Jesse Goldsmid*, during her life, if she should so long continue his widow, but not otherwise, or longer. If she should marry again, then, from such her marriage, the stock, with the dividends subsequently accruing thereon, was to sink into the residue of his personal estate in his said will given and bequeathed. If, on the other hand, she should not marry again, the capital monies, and the should sink into the general residue of his estate; the widow executed a deed, purporting to be an appointment of the property to the residuary legatees in the same proportions in which they would have been entitled to it under the residuary clause; and she and they concurred in assigning the funds upon trust for the residuary legatees: the Court refused to act upon the appointment and assignment during the widow's life.

A testator bequeathed certain funds in trust for his wife, during her widowhood, and, after giving her a power to appoint them by deed or will, provided she did not marry again, directed, that, upon her second marriage, or her death without having exercised her power, they

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dividends which should become due thereon, were to be transferred and paid, after her decease, to such person or persons, and at such times and in such proportions, as she, by any deed or deeds, or by her last will, (which instruments were to be executed with certain formalities), should appoint; and in default of appointment by *Jesse Goldsmid*, the stock and dividends were, upon her decease, to sink into and compose part of the residue of the testator's personal estate thereinafter given and bequeathed.

The testator gave also to his executors a further sum of 25,000*l.*, to be in like manner laid out by them, in their joint names, in 3 per cent. Consolidated Bank Annuities, which, with the dividends thereon, were to be held in trust for *Jesse Goldsmid* during her life, if she so long continued a widow, but, if she married again, were thenceforth to sink into the residue of the testator's personal estate, and be in trust for the several persons who might be entitled to such residue under that his will. If *Jesse Goldsmid* did not marry again, then two equal fifth parts of the stock purchased with the 25,000*l.*, and the dividends thereon, were directed "to be paid, transferred, shared, and divided, after the decease of *Jesse Goldsmid*, unto and between all and every such children, if more than one, as the testator should have by the said *Jesse Goldsmid*, or with which she might be *enceinte* at the time of his decease, or the whole of such two fifth parts of such capital stock and dividends to one of such children only," at such times, and in such manner and proportions, as she the said *Jesse Goldsmid* by any deed, &c., or by her last will, &c. should appoint; and, in default of appointment, these two equal fifth parts of the above-mentioned stock and dividends were, upon the death of the widow, to sink into the testator's residuary personal estate, and to be

in trust, as a portion thereof, for the persons who should be entitled to it under the will.

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With respect to his residuary estate, the testator, after directing the interest and dividends to be accumulated until his sons attained their respective ages of twenty-one or married (subject to an allowance for their maintenance, so long as they were severally under age), declared his meaning to be, that, when his sons should respectively attain their ages of twenty-one years, or marry with consent, there should thereupon be assigned and transferred unto each and every son, on attaining his age of twenty-one years, or so marrying, one full moiety of his share of the said residuary estate, and of the accumulations which should have been made thereupon; and that the interest of the other moiety should be paid to him, until he attained the age of twenty-five years; at which time the whole moiety was to be transferred to him absolutely. Provision was next made for the case of any son dying under twenty-one, and unmarried; and then came a clause declaring, "that, in case all the sons should live to attain his and their several and respective ages of twenty-one years, or be previously married with such consent as aforesaid, and any or either of them should happen afterwards to depart this life under the age of twenty-five years, and without leaving lawful issue who should live, if male, to attain the age of twenty-one years, or, if female, to attain that age or marry," in such case the testator bequeathed "the other remaining moiety, both original and accrued, of such son and sons so dying, of and in the residue of his estate, unto and between the survivors and survivor of all his said other sons, share and share alike; and if there should be only one such surviving son, the whole to such only surviving son

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absolutely; the part and share both of principal and interest to be paid to such surviving son or sons at the time and times his and their original share and shares of their several remaining moieties, and the interest thereof, was or were appointed to be paid as aforesaid, and to be in all respects subject and liable to the like trusts thereof."

The testator died in *April* 1818, leaving, besides his widow and daughters, five sons him surviving, whose names were *John Louis*, *Henry*, *Lionel*, *Albert*, and *James*. The last of these attained the age of twenty-five years on the 25th of *December* 1812, and died on the 18th of *October* 1814, unmarried and intestate. The four other sons were still alive, and had all attained the age of twenty-five years. *John Louis Goldsmid* and *Henry Goldsmid* had taken out letters of administration to *James*.

The sums of 2000*l.* and 25,000*l.* were duly invested according to the directions of the will; and the stock purchased therewith now stood in the names of the three trustees — the widow *Jesse Goldsmid*, who was still unmarried, *Isaac Lyon Goldsmid*, and *Timothy Yeats Brown*.

By an indenture, dated the 2d day of *April* 1823, which was made between the widow of the one part, and the four surviving sons (all of whom had attained the age of twenty-five years) of the other, and which was executed with the formalities required by the will of *Benjamin Goldsmid*, *Jesse Goldsmid*, in pursuance of her power, appointed (without prejudice to her own life interest) that, after her death, without being married, the stock, in which the 2000*l.* was invested, should be paid

and transferred to *John Louis Goldsmid*, who was to stand possessed of the same, as to one fourth part, for his own use; and, as to the remaining three fourth parts, for his three brothers, share and share alike; and, likewise, that nine tenth parts of two fifth parts of the stock in which the sum of 25,000*l.* was invested, should, immediately after her death, belong and be paid to her four sons equally, as tenants in common.

By another indenture, dated the 3d of *April* 1823, the widow *Jesse Goldsmid*, so far as related to the dividends of the stocks so appointed as aforesaid, which should become due during her widowhood, and her four sons, *John Louis Goldsmid*, *Henry Goldsmid*, *Albert Goldsmid*, and *Lionel Goldsmid*, so far as related to their right and interest in the said stocks, assigned and transferred the dividends and principal thereof to *James William Ogle* and *Richard Lovell Brown*, their executors and administrators, as trustees to hold the same "upon trust to pay and apply the said stocks and the produce thereof in such manner as each of them the said *John Louis Goldsmid*, *Henry Goldsmid*, *Albert Goldsmid*, and *Lionel Goldsmid*, and his respective executors, administrators, and assigns, as to his or their respective part or share, should direct or appoint."

The object of the execution of these two indentures was to give the sons immediate dominion over so much of the fund as, it was supposed, they either *might* become ultimately entitled to under the mother's power of appointment, or, in the event of the failure or non-exercise of that power, *would* become entitled to by virtue of their father's residuary disposition. Two of the trustees, however, in whose names the stock stood upon the trusts of *Benjamin Goldsmid*'s will, refused to make any

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transfer, except under the direction of the Court, to the persons who, by the indenture of the 3d of *April*, were appointed trustees for the four sons. Accordingly, the present bill was filed by the last-mentioned trustees, the widow, and two of the sons, against the personal representatives of the testator, the trustees of the stock under the will, and the two sons who had taken out administration to their deceased brother *James*. The prayer of it was, that the indentures of the 2d and 3d of *April* might be established by and carried into effect under the direction of the Court, and that *J. L. Goldsmid* and *T. Y. Brown* might be decreed to join with *Jesse Goldsmid* in transferring the stock in which the 2000*l.* had been invested, and nine tenth parts of two fifths of the stock in which the 25,000*l.* had been invested, to *J. W. Ogle* and *R. L. Brown*, upon the trusts of the indenture of the 3d day of *April* 1823.

The trustees by their answer submitted to act as the Court should direct.

Mr. *Bickersteth*, for the Plaintiffs.

In any event that can happen, those, who now apply to have these sums transferred, must ultimately be entitled to them. *Jesse Goldsmid* has a power of appointing the sums, subject only to the contingency of her dying the testator's widow: and, should her power fail by reason of a second marriage, they fall into the residue, and, passing under the residuary clause, belong to the testator's four surviving sons, who, having all attained the age of twenty-five years, will take vested and absolute interests in their respective shares. In the event, indeed, of no good appointment being made, the representatives of *James*, the deceased son, will be entitled to a moiety of one fifth part of the principal and

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accumulations of the stock which was purchased with the 25,000*l.*; for the residuary clause gives to each of the five sons, upon attaining twenty-one, a vested interest in a moiety of their respective shares of the residue. But this possible interest of *James* has been carefully excepted from the operation of the two indentures: they affect only nine tenth parts of two fifth parts of the 25,000*l.*, and leave untouched the remaining tenth part, which is the utmost that the representatives of *James* can ever be entitled to.* The only property, therefore, upon which the bill seeks to act, is property, which, either under the power or under the residuary clause, must, upon the death of the widow, belong to her four sons, and in which no person, but she and they, has or can have any interest. If *Jesse Goldsmid* dies without marrying a second husband, the indenture of the 2d of *April* will be a good appointment, and, consequently, the indenture of the 3d of *April* will be a valid assignment to the sons' trustees. If, on the other hand, she marries again, the fund becomes part of the residuary estate; and, being, under the testator's residuary bequest, the absolute property of the sons, will pass by their conveyance to their trustees. Where one individual has the power of disposing of a sum of money, subject, on a particular contingency, to a restriction

* It would seem that, independently of the objections to the principle of the arrangement, which this bill sought to carry into effect, the indentures of the 2d and 3d of *April did* include funds to which the representatives of *James* might have become entitled. These two instruments, though they appointed and assigned only two-fifths of the 25,000*l.*, purported to pass the interest in the whole of the 2000*l.*; and as this latter sum was to fall into the residue, if the widow married again, the representatives of *James* would, in that event, have a right, by virtue of the residuary clause, to claim a moiety of the fifth of the 2000*l.* as well as of the 25,000*l.*

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in favour of certain other persons, can any reason be imagined, why those, in whose favour the restriction is created, and he who has the power subject to the restriction, should not by their concurrence be enabled to acquire the absolute dominion over the fund?

Mr. *Sugden* and Mr. *Barber*, for one of the trustees.

As *Jesse Goldsmid*'s power is contingent upon her dying a widow, it cannot be known during her life whether an appointment made by her is good: the indenture of the 2d of *April* is, therefore, as yet a mere dead letter; no interest can at present exist under it; no court can act upon it. Neither can the residuary clause of the will help the plaintiffs; for the operation of it upon the funds in question is likewise contingent: till the widow dies, it is impossible to say whether these sums will or will not form part of the residue.

It is said, that all the parties interested in the subject of the suit are before the Court. How does that appear? The residuary clause is very intricate; is the Court now in a situation to decide upon its effect, and to determine whether all, who may be ultimately entitled under it, are here to protect their rights? The daughters of the testator, as being some of the next of kin of *James*, have an interest in his share of the property: yet there is no person here to watch over this interest of theirs, except the personal representatives of *James*, whose claims in their own right are directly adverse to his estate.

Mr. *Tinney*, for the other opposing trustee.

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This bill calls upon the Court to exercise a very novel species of power by way of anticipation — to act immediately on two titles, both of which at present depend on a contingency, as forming together one perfect title; and to do so, because, though neither of them by itself is as yet worth any thing, yet either the one or the other, it is said, must ultimately be valid. Take the titles separately — there is nothing which can give the Court authority to act. Are we to proceed upon the power of appointment? While *Jesse Goldsmid* lives, it cannot be known whether she has any such power to exercise; her power being suspended till her death, no alleged exercise of it can be recognized by the Court during her life.

It is said, however, that, in the event of the failure of the power, the fund in question will fall into the testator's residuary estate, and will, by virtue of his residuary disposition, become the absolute property of those who seek immediate dominion over it. But *has* it become their property *now?* Or are we at present in a situation to divide the residue or to settle the construction of the residuary bequest? Surely, it is premature to consider what is to be done with the property, should no good appointment be made, or to deal with these sums as included in a residue, of which it is uncertain whether they will ever form a part.

Not only is this not the time for proceeding upon the testator's residuary disposition; it does not appear that all the persons, who may be interested in the residue, are parties to the suit. How does the Court know that these four brothers are the only persons interested in the residue, or in this presumed part of the residue?

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James, it is admitted, may turn out to have acquired an interest under the residuary bequest; and, accordingly, recourse has been had to the contrivance of excepting from the indentures of the 2d and the 3d of *April* a tenth part of the two fifths of the 25,000*l.*, which is calculated to be that portion of the fund to which his representatives may in certain events be entitled. The calculation may be right: but how can I now decide whether the portion of *James* has been truly estimated, represented, as his estate is, by two of his brothers, who, in their own right, have an interest adverse to that which it is their duty to claim in the character of his administrators. Under these circumstances we cannot touch the interest of *James*, in the absence of the daughters, who are among his next of kin.

Thus the plaintiffs claim under two titles, neither of which is at present complete: the power is at this moment worth nothing, for the widow may marry again: the title under the residuary clause is equally worthless, for there may be a good exercise of the power. Can then two incomplete titles make one complete title? Can two contingent, defeasible rights make one sure and indefeasible right? Separately, neither title is good; for there is an objection to each: how then can they become good by conjunction?

It is of no avail to say, that ultimately a time will come, when, in one character or another, the persons, who now apply, will be entitled to the fund. They must wait till that day arrives. It is not the habit of the Court to intermeddle with property given by a testator's will upon specified trusts, till the time comes when the property may be disposed of in the very mode and form which the testator has prescribed. It was the intention of the testator that the funds in question should be

subject to a power of appointment in his wife, which, as it depended on the contingency of her dying a widow, was to remain in suspense so long as she lived. Till her death the destination of the property was not to be fixed: there was a restriction on the absolute disposal of it. If we dispense with this restriction, we do not execute the intention of the testator, but lend the aid of the Court to enable parties to set that intention aside.

The bill was dismissed.

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BETWEEN ANDREW REID and Others, PLAINTIFFS. *Dec.* 4. 15.

AND

WILLIAM MIDDLETON and MARY GRIFFITHS, . . . DEFENDANTS.

THE plaintiffs were equitable mortgagees, by deposit of the lease, of the *Gordon Arms* public-house, for money lent and advanced by them to the defendant *Middleton*, who was the tenant of the house at a small ground-rent. The defendant *Middleton*, after he had deposited the lease with the plaintiffs, had agreed to assign his interest in it to the defendant *Griffiths*, subject to the plaintiff's demand. The defendant *Griffiths* had been let into possession of the house under the agreement, but no assignment of the lease had been executed to her.

Where a receiver is appointed, and the person in possession refuses to attorn, or to deliver up possession, it not appearing in what right the possession is held, the proper course is to move that the person may attorn.

It is not necessary, in the first instance, to make such person a party to the suit.

The bill was filed on the 3d of *December* 1821, for the purpose of enforcing the equitable mortgage: and it prayed, amongst other things, the appointment of a receiver of the premises. On the 14th of *June* 1822,

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the defendant *Middleton* being out of the jurisdiction, and the defendant *Griffiths* in contempt for want of answer, the plaintiff obtained an order for the appointment of a receiver, with the usual direction that the tenants should attorn and pay their rents in arrear and growing rents to such receiver. On the 16th of *July* 1822, a receiver was appointed accordingly.

A motion was now made before the *Lord Chancellor*, on the part of the plaintiffs, that *William Jackson*, the person in possession of the *Gordon Arms* public-house, might be ordered, within fourteen days, to deliver up possession to the receiver; or, that it might be referred to the Master to set an occupation-rent upon the premises for the time which had elapsed during the possession or occupation thereof by the said *William Jackson*, and for the time to come; and that the said *William Jackson* might be ordered to pay the arrears and future payments of such rent, after deducting what he had paid or might pay for ground-rent, to the said receiver.

The motion was supported by the affidavit of the receiver, by which it appeared, that at the time of the filing of the bill the defendant *Griffiths* was in the occupation of the premises as claiming title thereto under the defendant *Middleton*; that in *April* 1822 the defendant *Griffiths* quitted the premises and delivered possession thereof to *Jackson*, who had ever since been in possession; that repeated applications had been made to *Jackson* to deliver up possession, or to attorn tenant to the receiver and pay rent to him, but that *Jackson* had refused either to deliver possession or to pay rent, though he had, from time to time, promised to come to some arrangement; that *Jackson* had paid rent to the ground landlord, and that whatever interest

had been acquired by him in the premises had been so acquired since the filing of the bill, and with full knowledge of the claim of the plaintiffs, of which he had been informed by the receiver before he entered into possession.

The motion had been made before the *Vice-Chancellor*, who had declined to make the order, upon the ground, as was stated at the bar, that, to enable the Court to enforce the receiver's possession, *Jackson* must be made a party to the suit; that, he being in possession, and it not appearing that he was tenant, the Court could not act upon his possession unless he was made a party. *Jackson*, though served with notice, had not appeared upon the motion before the *Vice-Chancellor*.

Mr. *Hart* and Mr. *Wigram*, in support of the motion, said, that if the rule of the Court was as laid down by the *Vice-Chancellor* the plaintiffs must abandon the suit. That *Jackson*, the moment he was made a party for the purpose of enforcing the receiver's possession, and before any order could be obtained, would deliver up possession to some other person, and an endless succession of supplemental bills would be necessary.

Mr. *Horne* and Mr. *Wilbraham* appeared for *Jackson*, and submitted that the objection made by the *Vice-Chancellor* was fatal to the application. But the *Lord Chancellor* said, that where a receiver was appointed, the ordinary direction was that the tenants should attorn; that the Court could not know who were tenants; but that if application was made to *A. B.* and *C.* to attorn and they would not do so, the course was to move that they should attorn, and then they were to come and inform the Court whether they were tenants or not.

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Mr. *Horne* and Mr. *Wilbraham* then stated, that *Jackson* had taken possession with the consent of the plaintiffs, and upon the understanding that he was to pay the ground-rent only.

The LORD CHANCELLOR said, that unless the contrary was shewn by affidavit, it must be understood that the plaintiffs only consented to *Jackson*'s taking possession upon the same terms as any other person, and directed the motion to stand over till the next seal, with liberty to *Jackson* to file an affidavit. If no affidavit was filed, the order was to be taken according to the notice of motion.

December 15. *Jackson* consenting to pay an occupation-rent to be settled by the Master, the order was made accordingly.

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ROLLS.
December 15.

An officer in the army cannot pledge or mortgage his commission.

An officer deposited his commission as a security for a loan of money, and further covenanted with the depositary *B.* to sell the commission, and to repay the loan out of the proceeds of the sale; a sale having been effected subsequently, and the regulation price having been paid to the retiring officer's agents, he transmitted to them a written order, directing them to discharge, out of the money in their hands, certain specified debts due from him to certain specified individuals, which individuals had no notice of his contract with *B.*: Held, that these creditors were entitled to a priority over *B.*

After the institution of the suit, the officer took the benefit of the insolvent debtors' act: Held, that *B.* had not any title, preferable to that of the general body of the insolvent's creditors, to the surplus which remained after the debts specified in the written order were satisfied.

ON the 19th of *March* 1807, *Charles Fallon*, being then a lieutenant in the eleventh regiment of dragoons, and having had various sums of money advanced to him by *Richard Campbell Bazett*, as agent of *Alexander Colvin*, who was resident in *Calcutta*, signed and delivered to Mr. *Bazett* a note, which was in the following words: —

"*London*, *March* 19. 1807.

"I hereby acknowledge to have received from Mr. *Richard Campbell Bazett* the sum of 150*l.* on the 31st *January* 1807, and on this date the sum of 350*l.*, making in all 500*l.*, which I engage to repay him on demand, with interest from the respective dates; and it is hereby understood that my commission as a lieutenant in the eleventh regiment of dragoons is deposited with Mr. *Bazett* as a security for these sums.

"CHARLES FALLON."

In *September* 1809, *Fallon*, being desirous of purchasing a captaincy in his regiment, applied to *Bazett*, as the agent of *Colvin*, to advance to him 1900*l.* for that purpose; and *Bazett*, in compliance with the instructions of his principal, agreed to advance the money, provided *Fallon* would secure the repayment

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of the 1900*l.*, and of a further sum of 600*l.* previously due from him to *Colvin*, both by his bond and by the deposit of the commission which he then held or might thereafter hold in the regiment. Upon these terms the money was advanced; and *Fallon*, on the 16th of *September*, executed a bond for 5000*l.* to *Colvin*, or his attorney, or his executors, administrators, or assigns. The condition of the bond was, that *Fallon* should insure his life and place the policy of assurance in *Bazett*'s hands; that he should deposit with the same gentleman the lieutenant's commission which he then held, and the captain's commission which he had agreed to purchase, accompanied with a letter addressed to the commander-in-chief, requesting his permission, or that of his majesty, to sell the commissions at the expiration of twelve calendar months from the date of the bond; and that he should accordingly sell the commissions, and out of their produce repay to *Colvin*, his executors, administrators, or assigns, or to *Bazett*, as his attorney, the sum of 2500*l.*, with interest, and the expenses of insurance, if in the meantime the regiment were not sent to *India*, or he did not procure an exchange into some troop or regiment stationed in *India*; but, if either of these events happened (*a*), that he should repay *Colvin*, his executors, administrators, or assigns, the 2500*l.*, with interest, and the expenses of insurance, by five yearly instalments.

Fallon afterwards purchased a captain's commission, and deposited it with *Bazett*, in whose hands it still remained.

(*a*) It did not appear in the pleadings, whether either of these events had happened. But, in fact, neither was the regiment sent to *India*, nor did Captain *Fallon* exchange into a troop stationed in *India*.

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On the 11th of *September* 1812, an indenture was executed between *Fallon*, of the first part, *Bazett*, of the second part, and certain creditors of *Fallon*, who had agreed to accept a composition of 10*s.* in the pound on their respective debts, of the third part. This deed declared that the commission, which was then deposited with *Bazett*, should remain in his hands as a security for the amount of the composition, and that, if the composition was not paid within twelve months, *Bazett* should have authority to sell the commission, and to apply the proceeds of it in discharge, first, of his own demand, and, next, of the sums due upon the composition to the creditors whose names were contained in an annexed schedule. *Fallon* also covenanted that he would concur in the sale, and do whatever might be necessary for effectuating it; and that he would not in the mean time incumber the commission, or do any act by which it might be incumbered, to the prejudice of those creditors or of *Bazett*; and he constituted *Bazett* his attorney for the purpose of making and completing the sale and of receiving the purchase-money.

From 1812 to 1815 matters remained in this state; and, during the interval, nothing was done under the last-mentioned indenture, although the composition had not been paid. In *January* 1815, Captain *Fallon*, having obtained leave from the commander-in-chief to retire from the service, and to sell his commission, employed Messrs. *Collyer*, as army agents, to assist him in effecting the sale. Under this authority they sold the commission to Lieutenant *Binney* for 1785*l.*, and received the purchase-money. *

* The exact date of the completion of the purchase did not appear in the pleadings. *Fallon*, in his answer, stated that he was a captain in the eleventh regiment of dragoons till on or about the 26th of *January* 1815.

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On the 12th of *January* 1815, *Fallon* delivered to Messrs. *Collyer* the following memorandum, bearing date on that day, and signed by him:—

"Sums to be retained by Messrs. *Collyer* out of the purchase-money of my troop in the eleventh dragoons, as lodged by Lieutenant *Binney* of that regiment; viz. 1785*l.*

Regimental debts, Lieutenant *Binney*'s acceptance - - - -	£	500	0 0
Messrs. *Armitt* and *Borough* - -		116	1 1
Captain *Duberley* for his draft - -		50	0 0
Messrs. *Fairlie*, *Bonham* and Co., and for which I have given a separate authority -		500	0 0

"I hereby authorize Messrs. *Collyer* to retain the above sum out of the purchase-money of my troop lodged in their hands."

On the same day he delivered to *Fairlie*, *Bonham* and Co. his promissory-note of that date for 500*l.*, accompanied by the following note, signed by him, and addressed to Messrs. *Collyer*:—

"*London*, *January* 11. 1815.

"Gentlemen,—I hereby authorize you to retain the sum of 500*l.* out of the money lodged by Lieutenant *Binney*, of the eleventh dragoons, for the purchase of my troop, to pay my order for that amount in favour of Messrs. *Fairlie*, *Bonham* and Co."

Messrs. *Collyer*, upon receiving this note, promised to retain, out of the money in their hands, 500*l.* for the use of *Fairlie*, *Bonham* and Co.; and the Master found, that it was their intention to have paid it, had they not

been prevented by *Bazett*'s claim, and the proceedings to which it gave rise.

On the 30th of *January* 1815, *Bazett* informed Messrs. *Collyer* of the assignment of the produce of the commission by the deed of *September* 1812. On the 1st of *February* following, he sent to their solicitor a copy of that indenture, at the same time giving them notice of the bond which had been executed, and of the fact that the commissions were deposited with him under a declaration, in *Fallon*'s handwriting, that they were intended as a security for the debt due from that gentleman to Mr. *Colvin*. Of the 2500*l*., *Fallon* had paid off 925*l*.; the remaining 1515*l*. was still unsatisfied, with an arrear of interest exceeding 964*l*.; and the sum due under the composition deed to the creditors who were parties to it, amounted to 800*l*. *Bazett*, therefore, as attorney of Mr. *Colvin*, and trustee for these creditors, insisted that he was entitled, in preference to every other claimant, to the fund produced by the sale of the commission, and called upon Messrs. *Collyer* to pay to him the whole of the money. On the other hand, *Fallon* commenced an action against the army agents for the recovery of the balance which would remain in their hands after the payment of the sums appropriated by the memorandum of the 12th of *January* 1815.

Under these circumstances, Messrs. *Collyer* filed a bill of interpleader, stating the various claims which had been made to the fund, and praying that the rights of the different claimants might be ascertained.

Fallon, by his answer, declared, that the commission had been sold entirely for his own purposes, and with the view of applying the purchase-money according to his own discretion: and he insisted, that both the bond

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and the indenture, so far as they affected to operate upon the produce of a commission, for the sale of which leave had not then been obtained, were contrary to the policy of the law.

On the 5th of *October* 1815, *Fallon* took the benefit of the insolvent debtors' act; and a supplemental bill was filed against *John S. Sharkey*, his assignee.

By an order, dated the 23d of *July* 1821, it was referred to the Master, to enquire into, and state the priorities of the different claims which had been made upon the money paid into Court by the Plaintiffs.

The report, dated the 12th of *May* 1823, set forth the claims of the different parties, and the circumstances upon which they were founded. After mentioning the demand of *Sharkey* as assignee under the insolvent act, the Master added, that no assignment of *Fallon's* estate and effects had been produced, but that, in an order of the Insolvent Debtors' Court, dated the 4th of *August* 1818, *Sharkey* was described to be assignee of *Fallon's* estate, and ordered to account for the effects gotten in by him in that character.

At the hearing on further directions, the claims of three adverse interests were to be determined.

First, *Bazett* claimed a lien on the fund in Court, which entitled him, and those whom he represented, to payment of the whole of their demands, in preference to every other creditor.

Secondly, the creditors, enumerated in the memorandum of the 12th of *January* 1815, insisted that they had a right to be preferred both to *Bazett*, and to the general creditors.

Thirdly, the assignee under the insolvent debtors' act denied the right of either *Bazett* or the creditors specified in the memorandum, to any priority; and, on behalf of the general creditors, claimed the whole of the fund, or, if one of the two alleged priorities should be sustained, the residue of it, for the purpose of proportional distribution.

Mr. *Shadwell* and Mr. *West*, for *Bazett*, argued,

First, that, by analogy to the principle, on which the deposit of the title deeds of real estate was held to constitute an equitable mortgage of the land, the deposit of a commission in the army as a security for money, particularly when that money had been advanced by the depositary to the borrower, to enable the latter to purchase the commission, and had been employed for that purpose, would create a specific lien on the money which might afterwards be raised by the sale of the military rank which the borrower had acquired and held by virtue of the commission so deposited.

Secondly, there was between *Bazett* and *Fallon* an express contract with respect to the future produce of the sale of the commission, which, in equity, constituted the latter a trustee for *Bazett* and those whom he represented, and gave them a specific lien on the money for which the commission should, at any time, be sold. "Whatsoever is the agreement," says Lord *Loughborough* in *Legard* v. *Hodges* (*a*), "concerning any subject, real or personal, though in form and construction purely personal and suable only at law; yet, in this Court, *it binds the conscience*," and, as he afterwards adds, "*raises a trust*." By the bond of the

(*a*) 1 Ves. jun. 478.

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16th of *September* 1809, as well as by the indenture of the 11th of *September* 1812, *Fallon* contracted, that, upon certain contingencies which have happened, the commission should be sold, and the money obtained for it applied in discharge of *Bazett*'s demand: therefore, in endeavouring to appropriate any part of that money to a different purpose, he seeks to commit a fraud upon his own contract. This engagement was consistent with the rules of law: 5 and 6 *Edward* VI. *c.* 16; 49 *Geo.* III. *c.* 127. *s.* 7.; *Berrisford* v. *Done.* (*a*) Even if objections could be taken to it, so far as it bound *Fallon* to sell his commission, it would remain valid to the extent of charging the money produced by the sale of the captaincy. *Greenwood* v. *Bishop of London.* (*b*)

Mr. *Horne* and Mr. *Norton*, for *Fairlie, Bonham* and Co., and the other creditors in the same situation with them.

It is settled that neither the full pay nor the half-pay of an officer can be assigned or pledged; *Berwick* v. *Read* (*c*); *Flarty* v. *Odlum.* (*d*) The principle has been extended to other transactions, comprehended within the same views of public policy, which were the foundation of the rule; *Davis* v. *The Duke* of *Marlborough* (*e*); and it will undoubtedly include such dealings as those which have taken place between *Fallon* and *Bazett*. If the pay of an officer cannot be pledged or assigned, *à fortiori* the commission itself and the right and title to that military rank, in respect of which the pay becomes due, must be incapable of being so dealt with. The money, which, upon the retirement of an officer from the army, is fre-

(*a*) 1 Vern. 98.
(*b*) 5 Taunt. 727. 1 Marsh. 292.
(*c*) 1 H. Blacks. 627.
(*d*) 5 T. R. 651.
(*e*) 1 Swanst. 79.

quently paid by the individual who succeeds to his rank, is not the price of any property transferred from the former to the latter: it is only with the permission and by the authority of the crown that it is paid by the one or received by the other. The sum, which Lieutenant *Binney* deposited in the hands of the army agents, was not the consideration-money for any property, interest, or thing which *Fallon* either had or could have pledged or assigned; it was merely in consequence of the royal favour, that *Fallon* became entitled to that sum: and, consequently, *Bazett* had no lien upon it. On the other hand, the creditors enumerated in the memorandum of the 12th of *January* 1815 had a lien upon it: for that memorandum was, to the amount of the sums stated in it, a good equitable assignment of an existing fund held by Messrs. *Collyer* for the benefit and at the disposal of *Fallon*. *Ex parte Alderson*. (*a*)

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The question is not, Whether it is legal for an officer to sell his commission, but what is the effect of his making a deposit of the parchment or instrument which appoints him to hold, and is the evidence of his being invested with, a certain military rank? Can such a deposit be lawfully made by an officer who continues in the service? If it can be so made, what are the rights which it gives to the depositary? A military commission is in its very nature personal; being the authority under which the individual named in it is to act, it cannot be separated from him, and is of no use to any one else. If he should be taken prisoner — if any doubt should arise with respect to seniority or comparative rank — should there, on any occasion, be a question as to his title to enjoy all the rights and privileges attached to

(*a*) 1 Mad. Rep. 53.

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the service, — the commission is the document on which the officer must rely, and which he must therefore take care to keep always within his own power. If he were at any time called upon to produce the authority under which he claimed to act, would it be any answer to say, that he had placed it in pledge or mortgage? The commission is not property: he could not sell it; more than the parchment, at least, he could not sell; and for the purpose of effecting a sale of the office, the possession of the parchment is not necessary. Apart from the officer named in it, the commission is nothing; in the hands of a stranger it is mere waste paper, conferring neither authorities nor rights. The depositary could not go to the war-office and claim either whole or half-pay; for military pay is not assignable: neither could he give any body else a right to receive pay. The most alarming consequences might follow, if it were to be held that an officer might pledge or mortgage his commission; and it is of importance that it should be generally understood, that this Court will not entertain the doctrine, that an officer, while he remains in the service, can lawfully part with his commission by way of pledge or mortgage, or that he can, by so doing, give the depositary any rights with respect to it.

Fallon, in depositing his commission with *Bazett*, did that which he could not do legally, and which, therefore, cannot create a lien in favour of *Bazett*. For the purpose of establishing his present claim, the deposit is nothing. The parchment instrument was all that was put into his hands; he still has it, and he may make of it what use he can.

Bazett therefore, if he can maintain his claim at all, must stand exclusively upon contract; and a contract he undoubtedly had, but not such contract as

creates lien. The argument on his side has been, that, whenever parties contract with respect to a subject-matter, that subject-matter is thereby bound. I assent to the principle when rightly understood; but it is a principle which must be received with qualifications. Contract with respect to a given matter binds the property as between the parties to the contract; but it does not affect the rights of third persons, or bind the property in reference to any claim which they may have upon it, unless they either have notice, or are volunteers. This limitation of the proposition is stated explicitly by Lord *Loughborough* in the very passage which was relied on.(*a*) "Whatsoever," says he, "is the agreement concerning any subject real or personal, though in form and construction merely personal and suable only at law, yet, in this Court, it binds the conscience;" that is to say, the conscience of the parties to the agreement, and of those who claim under them either with notice or without consideration. For his Lordship adds, "This maxim I take to be universal, that, wherever persons agree concerning any particular subject, that in a court of equity, as *against the party himself, and any claiming under him voluntarily or with notice*, raises a trust." Now *Fairlie* and Co., and the other persons who along with them claim a lien on the fund in Court, in opposition to *Bazett*'s demand, though they claim under *Fallon*, do not claim voluntarily or with notice. They are *bonâ fide* creditors; and there is no evidence that they had notice of *Fallon*'s agreement with *Bazett*. By the bond and the indenture *Fallon* engaged, that, when his commission should be sold, part of the produce of it should be appropriated to pay *Bazett*; and that contract was undoubtedly good and binding as between *Fallon* and *Bazett*. The commission was subsequently sold through the agency of Messrs. *Collyer*, who re-

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(*a*) 1 Ves. jun. 478.

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ceived the money on behalf of the vendor; and he directed them to apply a certain part of it in discharge of the claims of some creditors, whose names, with the amount of their respective debts, are set forth in a written particular. The agents consider themselves bound, as against the property, to distribute it according to this particular; though having, before it was so applied, received notice of *Bazett*'s claim, they have thought it prudent to transfer the fund into Court, and to abstain from acting upon their own responsibility. The vendor's order to the agents to pay the creditors was an appropriation of the money; and these creditors, through the agents, obtained possession of the fund. Whether the vendor, in making that appropriation, committed a fraud upon his contract with *Bazett*, is a question with which they have no concern; for they were no parties to that contract, and had no notice of it. The case would be very different, if it were shown, either that they had notice of *Bazett* and Co.'s rights under the agreement with *Fallon*, or that they were not creditors for a valuable consideration.

In truth, this is the common case of a debtor, who, having a fund in the hands of his banker, gives some of his creditors a right to take it, and distribute it among themselves in satisfaction of their demands. The order on Messrs. *Collyer* to pay the creditors enumerated in the memorandum of the 12th of *January* was an assignment by *Fallon* of a *chose in action*: it created lien, and those, in whose favour it was given, got hold of the fund. The adverse claimants have nothing to oppose to this lien, except contract.

Therefore, on both of the questions raised in this suit, *Bazett* must fail. (*a*)

(*a*) See the following cases:— *Crouch* v. *Martin*, 2 Vern. 595.; *Law* v. *Law*, Cas. temp. Talbot, 140.; *Stuart* v. *Tucker*, 2 W.

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This point having been determined, Mr. *Roupell*, for the assignee under the insolvent debtors' act, was proceeding to argue, first, that no person was entitled to any preference over the general creditors; and, secondly, that, even if the creditors, whom the Court had preferred to *Bazett* and Co., were to be preferred to the general creditors, *Bazett* and Co. had no title to priority, and ought to rank *pari passu* with the other creditors of the insolvent.

The MASTER OF THE ROLLS. The Master in his report finds, that no assignment of the estate and effects of *Fallon* had been produced before him. The Court cannot listen to counsel for an alleged assignee, of whose title to that character of assignee, in which alone he would have a right to be heard, it has not the requisite evidence.

The decree directed that the Master should tax the costs, and compute interest up to the date of his further report on the debts of *Fairlie*, *Bonham*, and Co., *Armitt* and *Borough*, and *Duberley*, and that they should be paid their principal, interest, and costs out of the fund in court. It then ordered "the residue of the money and cash to be paid to the defendant *Richard C. Bazett*, on account of his claim of 2539*l.* 13*s.* 9*d.* for principal and interest mentioned in the Master's general report (*a*); and

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Blackst. 1137.; *Lidderdale* v. *The Duke of Montrose*, 4 T. Rep. 248.; *Stone* v. *Lidderdale*, 2 Anst. 533.; *Mouys* v. *Leake*, 8 T. Rep. 414.; *Davis* v. *Edgar*, 4 Taunt. 63.; see also 1 G. 2. st. 2. c. 14. and 1 G. 4. c. 119. s. 38.

(*a*) Sir *Thomas Plumer* did not decide any question as between the assignee under the insolvent debtors' act on the one hand, and either *Bazett*, or the creditors, whose priority was established, on the other hand; though the principles, on which his judgment proceeded, would obviously sustain the claim of the latter against that of the ge-

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his Honor," the decree added, "doth not think fit to give any costs to the defendant, *R. C. Bazett*." (*a*)

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Dec. 6. 10.

Sharkey, the assignee under the insolvent debtors' act, presented a petition of rehearing, which prayed that the Court would reverse so much of the decree of the 15th of *December* 1823 as directed the residue of the money produced by the sale of *Fallon*'s commission to be paid to the defendant *Richard C. Bazett*, and, instead thereof, would order that residue to be paid to the petitioner in his character of assignee.

It did not question the priority of the creditors who were included in the memorandum of the 12th of *January* 1815.

Mr. *Roupell* and Mr. *Knight*, for the petitioner.

Mr. *Horne*, Mr. *Shadwell*, and Mr. *West*, for *Bazett*.

The petitioner had obtained an order to prove *viva voce* at the hearing the assignment to him of *Fallon*'s estate and effects; but Mr. *Horne* and Mr. *Shadwell*

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neral creditors. Neither was the direction in the decree for the payment of the residue to *Bazett* the result of any opinion expressed by the Court on any question that might be raised between him and the assignee. In the circumstances, under which the cause came on to be heard, *Bazett* was the only party before the Court who was in a condition to assert any claim to the residue; for *Sharkey* had not proved himself to be assignee.

(*a*) The question argued and decided at this rehearing had not been brought before the Court at the original hearing on further directions; for *Sharkey*, not being then in a condition to make out his title to the character of assignee, could not raise the point.

relieved him from all difficulty on that point, by admitting that he was the assignee of the insolvent, and choosing to argue the question on its merits.

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For the petition it was argued, that the general creditors ought not to be postponed to *Bazett*, who, with his *cestui que trust Colvin*, were at the utmost only specialty creditors of *Fallon*. There was nothing in the transactions between *Fallon* and *Bazett*, which could create lien upon, or amount, in equity, to an assignment of, the proceeds of the sale of the commission. Indeed, that part of the decree, in which all parties acquiesced, proved, that the alleged lien of *Bazett* was altogether a nullity. For if *Bazett* was, in truth, assignee of the fund, his title, such as it might be, was the first in point of time, and would, therefore, have prevailed against the equitable assignment to particular creditors contained in the memorandum of the 12th of *January*. In fact, however, the Court had determined in favour of these particular creditors, and had even refused costs to *Bazett*. Consequently, *Bazett* could not be assignee of the fund; and, if he was not such assignee, he had no claim upon it, except as ranking *pari passu* with the other creditors.

In reply to this line of argument, Mr. *Horne* and Mr. *Shadwell* observed, that the reason why *Bazett* had failed in the competition with the creditors enumerated in the memorandum was, that these creditors had been held to be assignees of particular portions of the fund for valuable consideration. The present claimant did not fill that character; and, consequently, there was nothing in the principle which had prevented *Bazett* from having the first priority, to exclude him

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from preference over the general mass of creditors. The contract of *Fallon* with *Bazett* bound the proceeds of the sale of the commission as between the parties to that contract. The assignee under the insolvent act could not be in a better situation than the insolvent himself would have been; and, consequently, as against that assignee, the claim of *Bazett* must be allowed.

LORD GIFFORD, MASTER OF THE ROLLS.

December 10.

On the best consideration which I have been able to give the subject since the case was last heard, it appears to me, with the utmost deference for the decision of the late *Master of the Rolls*, that Mr. *Bazett* cannot substantiate the claim which he has made on the produce of these commissions.

It has been settled in various cases, on the ground of public policy, and it was admitted in the argument, that the pay of an officer in the army cannot be assigned by him to any other person. It is equally clear, that he has no right to alienate his commission; though, if he wishes to retire from the army, he may, under special circumstances, and through the medium of the commander-in-chief, obtain the leave of the crown to sell out for the regulation price. Undoubtedly, therefore, the commission itself was not alienable by Captain *Fallon*.

All that Captain *Fallon* did in the first instance was to deposit the commission itself with Mr. *Bazett*. This could at the utmost give a lien (if such a lien could be given) only on the parchment or paper of the instrument; and of that lien, such as it is, Mr. *Bazett* has the full benefit; for it appears by the Master's report, that the commissions are still in his hands.

Then, by the deed of 1812, Captain *Fallon* consented that *Bazett* should be at liberty to sell the commission. That consent never could be enforced; neither does it appear that any attempt was made to act upon it. *Bazett* never could have been entitled to effect a sale; for no officer in the army can, without the permission of the crown, authorize any other person to sell his commission.

A covenant was likewise procured from *Fallon* that he would do no act to incumber the commission. That covenant undoubtedly still exists in due force, if any remedy upon it can be obtained.

It appears to me, therefore, that the deposit of the commission, even accompanied, as it subsequently was, by the covenants in the deed of 1812, could not give Mr. *Bazett* a specific lien on the purchase-money which might afterwards be paid by any other officer, to whom Captain *Fallon*, in consequence of permission granted by the commander-in-chief, might sell his captaincy of dragoons.

When the requisite permission was obtained in 1815, Captain *Fallon* had no communication with Mr. *Bazett*; nor was Mr. *Bazett* a party to the subsequent sale. Throughout the transaction Captain *Fallon* acted by his own authority. It was he who employed the Plaintiffs to sell it; by them the sale was effected; into their hands the purchase-money was paid. The money being thus paid to them, I do not see how *Bazett* could have maintained an action at law against them for money had and received on his behalf. On the contrary, it is admitted, that, when the money came into the hands of the Messrs. *Collyer*, Captain *Fallon* had full authority to appropriate any part of it; and that authority he exer-

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cised by appropriating a sum to those creditors whose preferable title has been already ratified by the Court. The appropriation so made stands on grounds perfectly different from the present claim; for it was an appropriation, not of money *to be* received by the sale of a commission, but of money which had been actually received by the plaintiffs, and had become a debt due from them to him. The moment, therefore, that the memorandum, directing them to retain a sum of 1160*l.* for the benefit of particular persons, was communicated to them, they became trustees of so much of the fund for the use of the persons thus specified. With respect to the residue, the case is different: for, unless Captain *Fallon* consented to the appropriation of it, as he had consented to the appropriation of the other sums, it could not but continue to be what it was when it first came into the hands of the agents—money had and received by them for his use. Did he then appropriate it to the discharge of *Bazett*'s debt? quite the contrary. No sooner did *Bazett* give notice of his claim, than *Fallon* came forward to object to it, and to assert his right to dispose of the money as being received for his own use, and held solely for his own benefit.

If *Bazett* has no claim, it is clear, *Fallon* having taken the benefit of the insolvent act, that the money passed by the assignment to *Sharkey*, whose title as assignee, though not stated conclusively in the report, has been admitted at the bar.

1823.

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CERTAIN freehold and copyhold premises, represented by the bill as being subject to a mortgage for 500*l.* to *Eadon*, were devised and appointed by *Catharine Binnington*, the owner of the equity of redemption, to two trustees upon trust to sell, and, after paying the mortgage and some other debts, to divide the residue of the produce among her five children equally. The original trustees being dead, and the legal estate in the premises having descended to two infants, *Eadon*, in conjunction with two of the five persons entitled beneficially to the equity of redemption, filed the original bill on the 12th of *June* 1809, against the three other *cestuisque* trust, who were stated to be all out of the jurisdiction of the Court, and against the two infant trustees. It alleged that the whole of the 500*l.*, with an arrear of interest, was due to *Eadon* upon his mortgage, and that he was willing to concur with his co-plaintiffs in a sale; and it prayed, among other things, that the freehold and copyhold premises might be sold; that, if necessary, an account might be taken of what was due to *Eadon* for principal and interest; and that his mortgage debt might be discharged out of the money to be raised by the sale.

Where a decree ordered, that, in taking the accounts of a mortgagee in possession, annual rests should be made, and that the rents and profits of the premises, as often as they exceeded the interest accrued due on the debt, should be applied in reduction of the principal; a rest ought to be made at the date of the receipt by the mortgagee of a sum exceeding the interest, though occurring in the interval between the annual rests.

From that date the subsequent annual rests ought to be computed.

An equity of redemption, being subject to a trust for sale, the mortgagee, with some of the *cestuisque trust* of the equity of redemption, filed a bill for the sale of the premises, alleging that the whole of his principal, with an arrear of interest, was due to him, and suppressing the fact, that he had been for several years in possession; the result of the account was, that nothing was due on the mortgage when the bill was filed: Held, that the mortgagee must pay to the defendants the costs of so much of the suit as related to the mortgage, and the accounts and enquiries concerning it.

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The answers disclosed a fact, of which no mention was made in the bill, that *Eadon* had been for many years in possession of both the freehold and copyhold premises.

On the 6th of *July* 1813, a decree was made, which, so far as *Eadon* or his claims were concerned, was the usual decree against a mortgagee in possession; containing the common directions, that the Master should tax him the costs of the suit, and set an annual value by way of rent upon the premises, with which he was to be charged during the time of his possession. Under this decree, varied in some collateral points by an order of the 13th of *November* 1813, an occupation-rent was fixed, and the estates were sold.

In the subsequent proceedings it appeared that the copyholds, of which *Eadon* had claimed to be mortgagee, were, in truth, not included in his mortgage; and it was further alleged by those who were opposed to him in interest, that his debt had been satisfied by the rents and profits which he had received before the filing of the bill, and that his conduct had been such as not to entitle him to the indulgence with which, in ordinary cases, the Court treats a mortgagee. Accordingly, the matter was brought before the *Lord Chancellor*, by a petition for the rehearing of the original decree, and also a petition of appeal from an order made by the *Vice-Chancellor*. In this stage of the cause, the *Lord Chancellor* gave *Eadon* the option of being treated, with respect to the copyhold premises, either as a wrong-doer or as a mortgagee in possession; and, *Eadon* having elected to be dealt with in the latter character, a decree was pronounced, which, after ordering that some variations should be made in the former decree, and particularly that the clause providing for the taxation of *Eadon*'s costs should be omitted, directed the following

words to be added to it: — "And, it being admitted that the said plaintiff, *Francis Eadon*, had been in possession of, or in the receipt of, the rents and profits of the said copyhold premises, and he submitting to be charged as a mortgagee in possession thereof, it is ordered that the Master do take an account of the rents and profits of the said copyhold premises received by the said *Francis Eadon*, or by any other person or persons by his order or for his use, or which, without his wilful default, might have been received thereout: and the said Master is to set an annual value by way of rent on the said copyhold premises for the time during which *Francis Eadon* has been in the possession or occupation thereof, according to which the said *Francis Eadon* ought to be charged, and the said *Francis Eadon* is to be charged therewith accordingly: and in taking the said account of the rents and profits, and the account directed by the said decree with respect to the freehold premises, the said Master is to make annual rests, and when and as often as the rents and profits of the said freehold and copyhold premises shall exceed the interest of the mortgage debt, it is ordered that the same be applied in reduction of the principal money due in respect of the said mortgage debt," &c.

The Master, in his report, made the first rest on the 5th of *July* 1805, when he credited the mortgagee with 500*l.*, for principal, and 75*l.* for three years' arrear of interest, and debited him with two sums of 246*l.* 1*s.* and 110*l.* 5*s.*, which had been received by him in the preceding *February*, for profits and arrears of rent of the premises.

To this report an exception was taken; and the exception, besides resisting the report on two other points, stated, "that the Master had allowed 75*l.* for

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three years' interest on the principal sum of 500*l.* in mortgage to the defendant *Francis Eadon* up to the 5th day of *July* 1805, &c.; whereas the Master ought to have allowed interest on the said principal sum, not up to the 5th of *July* 1805, but only up to the 2d of *February* 1805, at which time he found that the said *Francis Eadon* received two sums of 110*l.* 5*s.* and 246*l.* 1*s.* for profits and arrears of rent of the mortgaged premises, and he ought then to have deducted such sums from the principal and interest of the mortgage."

The Master's reason for making the rests on the 5th of *July* was, that the mortgage-deed bore date on the 5th of *July* 1798, from which day the interest on the 500*l.* commenced.

Mr. *Agar* and Mr. *Knight*, for the exception.

By the words of the decree, the sums received in *February* 1805 were to be applied forthwith, first, to the discharge of the then existing arrear of interest, and next to the diminution of the principal. The *Lord Chancellor*, in ordering annual rests to be made, intended a benefit and not a loss to the mortgagor; but he will be a sufferer, instead of being a gainer, by that which was meant to be beneficial to him, if the Master's mode of taking the account be correct. The mortgagee received these two sums in *February*: he is not charged with them till the 5th of *July*; and yet during all this period interest is computed upon the whole of his principal. The effect of such a mode of calculation is to allow him interest on the whole of the principal debt, after a large part of it has been paid.

Mr. *Horne* and Mr. *Wakefield*, for the report.

The decree in express terms directs the Master to make annual rests. Such a direction excludes all rests

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which are not annual; and the exceptants, in fact, demand that the Master shall make other rests besides those ordered by the decree.

The MASTER OF THE ROLLS.

Notwithstanding the elaborate discussion which this subject received in the case of *Raphael* v. *Boehm* (*a*), there is considerable doubt as to the effect of a direction to the Master to make annual rests in taking accounts. In the case of a mortgagee, however, I cannot yield to the arguments by which Mr. *Eadon*'s counsel have endeavoured to maintain the report. A mortgagee can never receive more than his principal and interest on it at the rate of five per cent. Now, if, in the early part of the year, a payment is made to him exceeding the interest which is then due, and he is, nevertheless, allowed interest on the whole of his principal down to the end of the year, what is the profit which he derives from his mortgage in the interval between the date of that payment and the date of the annual rest? It is clear that a part of his principal has been repaid to him, and yet he receives interest upon the whole of it: in other words he gets more than five per cent. on the sum for which he is actually a creditor. Suppose that the sum paid to *Eadon* on the 2d of *February* had been equal to the whole of the 500*l.*, with the arrears of interest calculated to that day, would he have been entitled to interest on the 500*l.* up to the 5th day of *July*? Is it possible that such should be the effect of a direction to make annual rests? The sums, which a mortgagee in possession receives in respect of the mortgaged premises, at times intermediate between the dates of the annual rests, must be applied, when they exceed the interest, to the reduction of the principal; and, in

(*a*) 11 Ves. 92.

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the present case, that course is clearly prescribed by the very words of the decree.

The order made was, "that the exception should be allowed, except as to the sum of 75*l.*; and as to the said sum of 75*l.* the exception was allowed as to so much as was composed of interest between the 2d of *February* and the 5th of *July*; and as to such interest and the other part of the exception, it was referred back to the Master to review his report."

The Master, in reviewing his report, made a rest on the 2d of *February* 1805, and annual rests on the 2d of *February* in each succeeding year, and not, as he had before done, on the 5th of *July*.

Eadon took an exception to the report thus reviewed; insisting that the Master, after having ascertained what was due on the mortgage on the 2d of *February*, ought to have computed interest thereon to the 5th of *July* 1805, and thence to have settled the accounts by annual rests.

Mr. *Horne* and Mr. *Wakefield*, in support of the exception, argued, that the effect of the order on the former exceptions was merely to disallow certain items which the then report allowed to *Eadon*; so that, under it, the Master could correct only those particular items, but had no power to model the accounts anew, or to vary the date of the annual rests.

1825. *February 25.*

LORD GIFFORD, MASTER OF THE ROLLS, was of opinion that the report was right, and over-ruled the exception.

The result of the account, as stated in the Master's final report, was, that, on the 2d of *February* 1809, being the annual rest immediately preceding the 12th of *June*, 1809, which was the date of the filing of the bill, a balance of somewhat less than 12*l.* was all that remained due to *Eadon* upon his mortgage; and that, at the next annual rest, on the 2d of *February* 1810, there was a considerable balance against him. The proportion of the occupation rent for the period between the 2d of *February* and the 12th of *June* was greater than the sum due to him on the former day; so that, if he was to be considered as accountable on the 12th of *June* for so much of the annual rent as was proportional to the part of the year which had then elapsed, he had been overpaid at the time when the bill was filed. Under these circumstances, the question arose, by whom should the costs of the suit be borne?

In the course of the proceedings various suits, both of revivor and of revivor and supplement, had become necessary, in all of which *Eadon* was a defendant.

Mr. *Agar*, Mr. *Knight*, Mr. *Roupell*, and Mr. *Garratt*, for parties adverse in interest to *Eadon*.

As this, they argued, was in effect a suit for the payment of a pretended mortgage debt, which now appeared to have been overpaid at the time of filing the bill, it must be treated as a proceeding altogether unnecessary and improper; and it could not be entitled to more favour or indulgence than a foreclosure suit would have met with under similar circumstances. A mortgagee, who files a bill of foreclosure, when nothing is due to him, invariably pays costs; and, upon the same principle, the costs of the present suit must fall upon *Eadon*.

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Mr. *Horne* and Mr. *Wakefield*, for *Eadon*.

This is not a bill of foreclosure, but a bill for the sale of the premises. The two *cestuis que trust*, who are co-plaintiffs with *Eadon*, had a right, as against the trustees and the other *cestuique trust*, to call for a sale; but a sale could not take place without *Eadon*'s consent, or, considering the circumstances in which the property stood, be carried completely into effect without the interposition of this Court. A suit, therefore, if not absolutely necessary, was at least proper; to that suit *Eadon* was a necessary party: if he had been a defendant, it would have been ridiculous to have talked of throwing the costs of the proceedings upon him; and shall he fare the worse, because, out of his anxiety to save the estate the expense of an additional party, he has consented to be a co-plaintiff instead of a defendant? It was the honest belief of all parties, at the time when the bill was filed, that there was a balance due to the mortgagee. Even upon the account, as it now stands, after every technical advantage has been taken of his situation, and he has been charged, as mortgagee in possession, with the rent of premises of which in truth he was not mortgagee, there was a balance due to him at the annual rest immediately preceding the institution of the suit.

The MASTER OF THE ROLLS.

I cannot throw the costs of the whole suit upon *Eadon*. As this freehold and copyhold estate was subject to a trust for sale, it was undoubtedly competent to the owners of two fifths of the equity of redemption to come to the Court for the purpose of having the trust executed. So far as the suit had that object, I cannot say that it was instituted improperly; and there is no evidence that *Eadon* had recourse to any improper

practices, or exercised any undue influence over the persons who became co-plaintiffs with him in the original suit, in order to induce them to concur with him in the proceedings.

But infinitely the greater part of the expenses of this suit has been occasioned by the accounts and inquiries relative to the mortgage debt: and, to determine by whom this portion of the costs ought to be paid, we must inquire, whether *Eadon* has stated his case fairly in his bill. He has not stated it fairly. The bill contains not the slightest mention of the fact, that he was then, and had been for many years, in possession of the premises; and it was the answers of the defendants which first disclosed that most important circumstance. Not only does *Eadon* suppress that which he ought to have stated: he likewise alleges that which ought not to have been alleged; for he asserts that the whole of his principal, with an arrear of interest, was then unpaid. The frame of the suit, too, is not unworthy of notice. All the owners of the equity of redemption, except those who are stated to be out of the jurisdiction of the Court, are made co-plaintiffs with him: so that there was a great probability, that, if his accounts were gone into, no person beneficially interested in the result would be present at the investigation, except his own co-plaintiffs.

The accounts have now been taken against him: and from them it appears, that, when he filed the bill, he had been overpaid by a few pounds. If he had filed a bill of foreclosure, the account would have been taken up to the day of filing the bill; and if it had turned out, that on that day nothing was due to him, he must have borne the expenses of the suit which he had so improperly instituted. If, again, he had been made a

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defendant to a bill calling for a sale of the premises, he would have been bound, in his character of mortgagee in possession, which carries with it the obligation of having accurate accounts always ready, to have stated in his answer the amount of his demand fairly; and if he had done so, the *cestuique trust*, finding that he had admitted himself to have been fully paid, might have declined to ask or prosecute any inquiries or accounts against him, and might have proceeded, without expense or delay, to a sale of the estate. That could not be done, because *Eadon* concealed the true state of the case; and it is his misconduct which has occasioned all the expense of the accounts and inquiries relative to his mortgage. Therefore, as between him on the one hand, and the defendants in the original suit and their representatives in the revived and supplemental suits on the other, he must pay to those defendants and their representatives the costs of so much of the proceedings in these causes as relate to his mortgage, and the accounts and inquiries concerning it.

As to the *cestuisque trust*, who were originally co-plaintiffs with *Eadon*, though I will not make them pay costs, I cannot give them costs against him.

December 19, 20.

DEL PONT *v.* DE TASTET.

A few unnecessary words in a bill do not render it impertinent.

THE plaintiffs in this case were *Juan José Marco del Pont*, a merchant at *Madrid*, and *William Matthiessen*, his attorney in this country for the pur-

In a bill for an account, it is not impertinent to set out at length letters sent to the Defendant demanding the account, though the bill contains a general allegation that applications have been made to the Defendant to account, and the usual charge as to letters in the possession of the Defendant.

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poses of this suit; and the principal object of the bill was, to compel the defendant, a merchant in *London*, to account for the proceeds of some doubloons, alleged to have been remitted to him from *Lima*, on account of the plaintiff *Del Pont*. Various letters respecting the doubloons had been written by the defendant, in the *French* and *Spanish* languages, to the plaintiff *Del Pont*, and to some merchants at *Hamburgh*, who had acted as his agents in the business; and the bill set forth translations of different passages in these letters. The statement in the bill of each of these translations was introduced in the following manner: — That on or about &c. the defendant wrote and sent to &c. a letter, in the *French*, or, as the case might be, in the *Spanish* language, in which, according to an accurate translation of such letter into the *English* language, he the defendant expressed himself in the words and figures, or to the purport and effect, following, that is to say, &c. The bill also contained a long statement of the power of attorney by which the plaintiff *Matthiessen* was appointed the agent of the plaintiff *Del Pont*; and, in addition to the general allegation that application had been made to the defendant to account, and the usual charge as to letters papers and writings in the possession of the defendant, it set out, by way of charge, two letters, demanding the account required by the bill, which had been sent to the defendant by the solicitor of the plaintiffs shortly before the bill was filed.

The bill was referred for impertinence; and, on the 20th of *November* 1822, the Master reported it to be impertinent, as to the principal part of the power of attorney, and as to the words "in the words and figures or" wherever they occurred as introductory to the translations of the letters.

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The defendant excepted to the report, insisting, that the Master ought to have found the bill to be impertinent as to the words, "according to an accurate translation of such letter into the *English* language" introductory to the translations of the letters: and as to the whole of the letters sent to the defendant by the plaintiff's solicitor. The plaintiffs also excepted to the report, so far as it stated the bill to be impertinent as to the words, "in the words and figures or," but they did not dispute the report as to the power of attorney.

The two sets of exceptions were heard before the Vice-Chancellor on the 20th of *November* 1823, when his Honour ordered the defendant's exceptions to be over-ruled, and the plaintiffs' exceptions to be allowed.

From this order the defendant appealed to the Lord Chancellor; and the appeal now came on to be argued.

Mr. *Agar* and Mr. *Koe*, for the appellant, referred to Lord *Coventry*'s (*a*) and Lord *Clarendon*'s (*b*) orders against impertinence; and argued that, from the burden of the stamp duties, it was now more incumbent upon the Court to protect the suitors from prolixity in pleading. They insisted that it was unnecessary to set out the letters written by the plaintiff's solicitor, and said that the language of the bill, in the points excepted to, was such that it was impossible for the defendant to answer.

Mr. *Phillimore*, for the respondent, contended that, though the words in question might be superfluous, they were not impertinent; and that impertinence, in the sense which the Court applied to the words, was a state-

(*a*) Beames's Orders, 69. (*b*) Ibid. 165.

ment of irrelevant matter. He said that a particular answer, as to the letters written by his solicitor, might be most material to the plaintiff's case.

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The LORD CHANCELLOR.

There is a much greater degree of importance belonging to this question than there would be if it affected the present case only. The Masters have before represented to me, that it is absolutely necessary some step should be taken to prevent references for impertinence from being carried into their offices without the responsibility of counsel. I do not enter into the question whether the demand made by this bill can be supported. It must be remembered, that if references of this nature can begin without some sanction that they are right, it may be, in very many cases, that, for the purpose of delay, impertinence will be suggested where the suggestion cannot be sustained. Much of the expense of proceedings in this Court arises from the heavy burden of stamps; but I cannot agree that the mere existence of revenue laws can make any difference in the question, as to what is or is not to be considered impertinent. Looking at what has been the course of proceedings in this Court ever since I can remember it, I cannot lay it down, that twenty words shall be considered impertinent, and that nineteen words shall not be considered impertinent: I am unable to form a rule more distinct than this, to put it to the honour of counsel to recollect, that there may be an oppressive use of a rule in itself calculated to prevent oppression, and that they owe it to the Court to take care that there shall be none; to say that, because there are here and there two or three unnecessary words, it is making a right use of a rule to prevent oppression to refer the bill for impertinence, is a thing the Court ought not to endure. It

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has been said, that from the language of this bill there is difficulty in answering the questions, but I see no difficulty in answering them; not that the fact of there being difficulty in answering a question would necessarily make the question impertinent: by no means. With respect to the other part of the case, the letters written to the defendant, we have been in a great mistake ever since I remember the Court if the statement of those letters is to be considered impertinent, because there is a general charge in the bill as to letters in the possession of the defendant; the defendant might say that these letters were not in his possession, but he might be well able to say whether he received them or not. Besides, is it not a fair thing to remind a man, by specifying the particulars of that to which you want a special answer, upon which answer your whole case may depend. Upon the whole, I am clearly of opinion that the Vice-Chancellor is right.

Order affirmed.

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WILLCOX *v.* BELLAERS.

ROLLS.
1823.
December 24.

Where in a suit by a vendor for specific performance, the Master reported in favour of the title, but the Court, on an exception taken by the purchaser, deemed the title doubtful, an order was made dismissing the bill without costs, but neither allowing nor disallowing the exception.

Construction of words of a devise as to giving an estate tail.

THOMAS WILLCOX, by his will, devised all his freehold and copyhold or customary messuages and hereditaments to his son *Henry Thomas Willcox*, during his life; then, after his decease, to such of his children, and in such shares and proportions as the said *Henry Thomas Willcox* should by his last will appoint, and to their heirs, and for want of such appointment, and as to those parts of the premises of which no appointment should be made, to the heirs of the body of the said *Henry Thomas Willcox* and their heirs for ever. In case *Henry Thomas Willcox* should die without issue, then, immediately from and after his decease, the testator devised the estate to his, the testator's daughter, *Elizabeth Willcox*, during her life, remainder to such of her children, and in such shares as she should appoint, and in default of appointment to the heirs of her body, and their heirs and assigns for ever. "And in case my son," continued the testator, "shall live and have children as aforesaid, then I give and bequeath unto my said daughter *Elizabeth* the sum of 500*l.*, to be paid her on her attaining the age of twenty-one years, or day of marriage." Then, after bequeathing to his daughter a legacy of 200*l.*, and to his wife an annuity of 10*l.* during her widowhood, the testator devised all the residue of his estate, after payment of debts, legacies, and funeral expenses, to his said son *Henry Thomas Willcox*, or, if he died under the age of twenty-one years, and without issue, to his the testator's daughter *Elizabeth*.

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Henry Thomas Willcox was not the heir-at-law of the testator. Soon after he attained his full age, and before he had any issue, he suffered a recovery, the uses of which were declared to be to himself in fee. He afterwards contracted to sell the premises to the defendant, and the bill was filed to enforce the specific performance of that contract. Upon the coming in of the answer, an order was made referring the title to the Master: the Master reported in favour of the title, and upon exceptions to that report the question was now raised, whether *Willcox*, under the will and the recovery, could give a good conveyance of the fee.

Mr. *Sugden* and Mr. *Pemberton*, for the exception.

The vendor puts his case in two ways. He says, that either he is tenant in tail under the will, and then he has acquired a fee by the recovery, or that he is tenant for life with contingent remainders in fee over, and then that, by the recovery, he has destroyed these contingent remainders, and takes the fee under the residuary clause.

The will gives the estate to him for life, then to his children in fee as he shall appoint, and in default of appointment "to the heirs of his body in fee." These words will not give him an estate tail; for to put such a construction upon them would prevent the fee, which is expressly given, from taking effect; and, to give that fee effect, we must construe "heirs of the body" to mean children. The words "in case my said son *Henry Thomas Willcox* shall happen to die without issue," must be considered as meaning, not an indefinite failure of issue, but dying without issue at the time of the death of *Henry Thomas*, and, in that event, the testator, from and immediately after his son's decease, gives the premises to his daughter.

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This construction is further strengthened by the provision made for the daughter. That provision was intended for the case in which she would not take the estate: and what was that case?—"In case my son shall live and have children as aforesaid." The intention must have been, that if the son died and left children, his children should take a fee; if he died leaving no children, the limitations to the daughter and her children were to take effect.

Again, if it be contended that *Henry Thomas Willcox* was tenant for life, with contingent remainders over to his children on the one hand, if he had any, and if he had not, to the daughter and her children, we reply, that we cannot be compelled to take a title depending on the destruction of contingent remainders. In fact, however, the limitations to *Elizabeth* and her children may be construed to be executory devises.

The following cases were cited, *Doe* v. *Frost* (*a*), *Gretton* v. *Haxard* (*b*), *Mesert* v. *James* (*c*).

Mr. *Preston* and Mr. *Barber* contended that the vendor took by the rules of law an estate tail, and that there did not occur in this will any words sufficient to exclude the operation of the legal rule. They relied on the case of *Doe* v. *Jesson* (*d*) as a decisive authority in their favour, and they cited *Goodright* v. *Pollyn* (*e*), *Frank* v. *Stovin* (*g*), *Measure* v. *Gee* (*h*), *Smith* v. *Death* (*i*), *Doe* v. *Scott* (*k*).

(*a*) 3 B. 5106.
(*b*) 6 Taunt. 94.
(*c*) 1 B. & B. 484.
(*d*) 5 Maule & Sel. 95.; 2 Bligh, 1.
(*e*) 2 Lord Raymond, 147.
(*g*) 3 East, 548.
(*h*) 5 B. & A. 713.
(*i*) 5 Mad. 397.
(*k*) 3 M. & S. 300.

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Mr. *Sugden* in reply.

All the cases, in which it has been held that a person described as a tenant for life took an estate tail, depended on this principle, that there was a general gift over in default of a whole class of issue of that person, and that there were no words which could possibly have carried the estate through the whole of that class of issue, if taken by them as purchasers; and that, therefore, an estate of inheritance was given to the ancestor, in order that the estate might be carried through all that line of heirs who were clearly meant to take. But where the words were sufficient to carry the lands through the whole of that class of issue who were intended to take, (as for instance where there were words sufficient to pass a fee,) the Court has never given, by construction, an estate of inheritance to the person named as tenant for life.

Doe v. *Jesson* (*a*) has no connection with this case. There no words occurred, which would give the estate to the whole line of issue, whom it was clearly the testator's intention to include, unless there was an estate tail in the first tenant for life; and accordingly the Court of King's Bench held that the issue took only as tenants for life. The House of Lords, on the other hand, held, that the first tenant took an estate tail, because otherwise the intention of the testator could not be effectuated. Here there are words which may carry the estate through a whole line of issue, for a fee is given them.

1825. *December* 23. 1824. *February* 9. 1825.

The MASTER *of the* ROLLS stated that the case of *Doe* v. *Jesson* ought to be a lesson to the Court on the

(*a*) 5 Maule & Sel. 95.; 2 Bligh, 1.

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necessity of caution. There the King's Bench and the House of Lords had come to opposite conclusions with respect to the effect of certain words in creating an estate tail. He could not but consider that there was a very nice and doubtful question on the construction of the will on which the title of the present plaintiffs rested; and *Sheffield* v. *Lord Mulgrave* (*a*), *Roake* v. *Kidd* (*b*), and many other cases, showed that the Court would not compel a purchaser to take a doubtful title, or to accept a case for the opinion of a court of law. Therefore, without either allowing or over-ruling the exceptions, and without expressing any opinion on the title, he thought the bill ought to be dismissed.

It appeared that only the exceptions had been set down, so that no order of dismissal could be pronounced. His Honor, therefore, ordered that the exceptions should still stand for judgment. The Defendant then obtained by petition an order that the cause should be set down to be heard on further directions and costs, and that it should be advanced to be heard on the 9th of *February*, together with the exceptions which stood for judgment. On that day an order was made that the bill should be dismissed without costs, and that the deposit on filing the exceptions should be returned to the Defendant.

The plaintiffs appealed.

Lyndhurst, Lord Chancellor, affirmed the order. 1827.

(*a*) 2 Ves. 528. (*b*) 5 Ves. jun. 647.

1823.
May 12. 31.
June 12. 18. 28.
Nov. 20.
1824.
Feb. 6, 7. 19.

The Court will entertain a bill to compel partners to act according to the provisions of instruments into which they have entered, and, where it will interfere for that purpose, will take care that the decree shall not be defeated by any thing done in the meantime.

Thus, where in 1812, the then proprietors of *Covent Garden* theatre executed a deed, by which they covenanted and agreed that the profits of the theatre should be exclusively appropriated to particular purposes, and that the treasurer for the time being should be irrevocably directed so to apply the profits, and in 1822, parties then entitled, under the former proprietors, to seven eighths of the theatre, entered into an agreement, which provided in some respects for a different application of the profits, and otherwise affected the rights of a party interested in the remaining eighth, who was not consulted on the subject, the Court, upon a bill filed by that party, for the specific performance of the covenants and agreements contained in the deed of 1812, appointed a receiver.

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AT the time of the destruction by fire of the late Theatre Royal *Covent Garden*, *Thomas Harris*, *John Philip Kemble*, *George White*, *Ann*, the wife of *John Martindale*, or the trustees under her marriage settlement, and *Henry Harris*, were entitled to the theatre, and the buildings, patent, property, and effects belonging thereto, in the following shares or proportions; *Thomas Harris* to four eighth parts or shares thereof, *John Philip Kemble* to one eighth part or share, and one third of another eighth part or share thereof, *George White* to one eighth part or share thereof, *Ann Martindale*, or her trustees, to one eighth part or share thereof, and *Henry Harris* to the remaining two thirds of an eighth part or share thereof. After the destruction of the late theatre, a new theatre was built, and was furnished with the requisite scenery, property, and effects, at the costs of the proprietors, according to their respective shares and interests.

By an indenture, bearing date the 9th of *March* 1812, and made between *Thomas Harris* of the first part, *John Philip Kemble* of the second part, *George White* of the third part, *Ann Martindale* of the fourth part, *John Martindale* of the fifth part, *Henry Harris* of the sixth part, and *John Brandon* of the seventh part, — after reciting to the effect aforesaid, and further reciting,

that, in order to secure the payment of monies, then due and owing from the said proprietors, on account of the building, and newly furnishing, and otherwise on account of the theatre, several bills of exchange had been accepted by some of the proprietors, on behalf of themselves and the others of them, and several bonds had been made and entered into by all the proprietors, and that, previously to the execution of the said bonds, it had been stipulated and agreed by and between the proprietors, that, for the purpose of providing for the due and regular payment of the said bills of exchange, and of the monies secured by the said bonds, the funds of the theatre should be exclusively bound and appropriated, and the treasurer for the time being should be irrevocably directed to make such appropriation and application of the monies to come to his hands, as thereinafter mentioned and expressed, and also reciting, that *John Brandon* was the then present treasurer of the theatre, — the said *Thomas Harris*, *John Philip Kemble*, *George White*, *Ann Martindale*, and *Henry Harris*, irrevocably ordered, directed, and appointed, that the treasurer for the time being of the theatre should, from time to time, pay, apply, and dispose of the monies, which should from time to time come to his hands as such treasurer, first, in payment of the outgoings attendant upon the theatre, and the management thereof, and of all other debts then due on account of the theatre, and to the payment of which the proprietors then were, or should or might be jointly liable; secondly, in payment of 1000*l.*, in part of a debt then due on account of the building of the theatre; and thirdly, in or towards the discharge of the monies secured by the said bills of exchange and bonds, as the same should respectively become due, until all the said bills of exchange, and the monies secured by the said several bonds, should be fully paid and satisfied, subject never-

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theless to the *proviso* thereinafter contained; and the said *Thomas Harris*, *John Philip Kemble*, *George White*, *John Martindale*, *Ann Martindale*, and *Henry Harris*, mutually covenanted, that they, their executors, administrators, appointees, or assigns, would not, on any pretence whatever, divert or prevent any money belonging to the theatre, on the general account thereof, from coming to the hands of the treasurer for the time being, and would not receive or take any money, which should thereafter come to the hands of the treasurer for the time being on the general account of the theatre, contrary to the application, order, direction, and appointment therein contained, and the true intent and meaning of the indenture, and would not in any wise interfere with the payments or applications thereby directed to be made by the treasurer, or impede or interrupt the course of such payments or applications; and also, that no payment or division of any money, as or for the net gains and profits of the theatre, should be made to or between any of the said proprietors, until after the several payments, by the said indenture provided to be made to the creditors of the theatre, whose debts were secured by the said bills of exchange and bonds, should have been fully satisfied, and until after the treasurer of the theatre for the time being should have made up his account to the close of the theatre, at the end of the then present and every future season thereof, and should have delivered to the said proprietors, or such of them as should have required the same, such copies or duplicates of each and every such account as had been usually delivered; subject nevertheless to a *proviso*, that if, upon the making up of any such general annual account, at the close of the then present or any future season, whilst any of the monies secured by the said bills of exchange or bonds should remain unpaid, it should appear, that, after paying or appropriating

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monies, actually remaining in the hands of the bankers employed for the theatre, sufficient for the payment of the outgoings attendant upon the theatre and the management thereof, which were usually paid about the close of the theatre in each season, and of such of the sums secured by the said bills of exchange and bonds, as should have become due previous to the making up of such general annual account, any surplus should remain in the hands of the treasurer, on account of the general gains and profits of the theatre, two thirds of such surplus should, with the consent in writing of the major part in value of the proprietors for the time being, be divided between the said proprietors, according to their respective shares and interests, and the remaining third of such surplus should continue as a fund, to provide for the future outgoings and monies by the said indenture directed to be paid and discharged by the treasurer. The indenture also contained a covenant by *Brandon*, that he would, whilst he continued to be the treasurer of the theatre, apply the monies then already received and unapplied, and which should from time to time come to his hands as such treasurer, in the manner, and for the purposes, by the said indenture directed, and in no other manner, and for no other purpose whatever.

George White died in *December* 1813, having, by his will, appointed *James Trotter* and *William Harrison* to be his executors, and directed his share of the theatre to be sold, and the produce thereof divided between his two daughters, *Elizabeth Percy*, afterwards the wife of *John Saltren Willett*, and *Letitia Mary*, afterwards the wife of *John Forbes*.

Thomas Harris died in *October* 1820, having, by his will, bequeathed his share of the theatre to the

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said *Henry Harris*, whom he appointed to be his sole executor.

John Philip Kemble, in *November* 1820, assigned his share of the theatre to *Charles Kemble*.

John Martindale died in *October* 1814, and, upon his death, *Ann Martindale* became entitled to the uncontrolled dominion of her share of the theatre. She died some time in *August* 1821, having, by her will, dated the 17th of *December* 1818, bequeathed the said share to *Francis Const* for life, with remainder over, and appointed *Francis Const* to be her sole executor.

Thomas Harris, for many years previous to his death, had the entire management of the concerns of the theatre, without any interference on the part of the other proprietors; and on his death *Henry Harris* succeeded to the exclusive management, without the other proprietors objecting thereto; but *John Saltren Willett*, *John Forbes*, and *Charles Kemble*, afterwards became dissatisfied with *Henry Harris*'s management, and various disputes and differences thereupon arose between the parties, which terminated in an agreement, bearing date the 11th of *March* 1822.

By that agreement, which was made between *Henry Harris* of the one part, and *John Saltren Willett*, *John Forbes*, and *Charles Kemble*, of the other part, *Henry Harris*, so far as the agreements therein contained were to be performed by, or were applicable to him, and *John Saltren Willett*, *John Forbes*, and *Charles Kemble*, so far as the agreements therein contained were to be performed by, or were applicable to them, or any of them, or to *Francis Const*, or the estate of *Ann Martindale*, mutually agreed, that the undivided shares of them, the

parties thereto, being equal to seven eighths, of and in the theatre, and the buildings, scenery, machinery, wardrobe, dramatic pieces, articles, property, and effects belonging thereto, and of and in the patent, and licences, by virtue of which the performances at the theatre were exhibited, should be vested in *William Harrison*, subject to certain leases therein mentioned, and, amongst others, to a lease of one of the private boxes, for alternate weeks, at the yearly rent of 210*l.*, to a lease of the fruit-rooms, at the yearly rent of 500*l.*, and to a lease, for thirteen nights in each year, of the parts of the theatre commonly used for oratorios, at the yearly rent of 650*l.*, upon trust, that he, *William Harrison*, immediately after the said shares and premises should be so vested in him, should, with the consent of *Henry Harris*, make a lease thereof, subject as aforesaid, to *John Saltren Willett*, *John Forbes*, and *Charles Kemble*, their executors, administrators, and assigns, to take effect, as from the day next before the day of the date of the agreement, for the term of ten years, to be computed from the 1st of *August* 1821, at the yearly rent of 10,500*l.*, payable to *William Harrison*. The agreement provided, that the lease should also be made subject to the payment of the ground rents, and other outgoings of the theatre, and that it should contain, amongst others, the following covenants and provisos: covenants by the lessees for the payment of the whole of the ground-rents, and other outgoings; for the repair and preservation of the theatre, and of the scenery, machinery, wardrobe, dramatic pieces, and other effects, and of any additions which might be made thereto; and for liberty to *William Harrison* to enter and see the state of repairs; covenants for regulating the performances at the theatre, and the purposes for which it was to be used; provisos that any

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excess which there might be in the quantity of the wardrobe, at the end of the term, should be taken by the proprietary at a valuation; and that if the lessees should set up a printing press, or any other machinery, in the theatre, not being fixtures of such a nature as would belong to the ground-landlord, the same, unless removed by the lessees, should also, at the termination of the term, be taken by the proprietary at a valuation, and that the amount of such valuation should be considered as a debt due from the proprietary; a proviso, that if there should be a partial loss by fire, the amount should be ascertained, and that if the amount should exceed 5000*l.*, the lease should be void, unless *Henry Harris* and the lessees should agree to continue it, but that, if the amount should not exceed 5000*l.*, or if it should exceed that sum, and it should be agreed to continue the lease, the lessees should expend the amount in making good the loss, and that the sum expended should be considered a debt from the proprietary, and that the payment thereof, with interest at 5 *per cent.*, should be provided for in the same manner, as thereinafter mentioned with respect to the general debt; and a further proviso, that nothing in the lease should oblige the lessees, as between them and *Const*, and the estate of *Martindale*, to pay *Const*'s, or *Martindale*'s, proportion of the ground-rents, or other outgoings, or to bear *Const*'s, or *Martindale*'s, proportion of the repairs, or to prejudice the remedies of the lessees in respect thereof, against *Const*'s, or *Martindale*'s, estate, or to give the latter respectively any benefit. The agreement further provided, that *Harrison* should stand possessed of the reserved rent of 10,500*l.*, and of the sums which *Const*, or the estate of *Martindale*, should from time to time pay to him, as thereinafter mentioned, upon trust, after payment of all expences, costs, and charges, attending the trusts,

to pay the existing general debt, due from the general proprietary of the theatre, on account thereof, up to the day next before the day of the date of the agreement, with interest on such parts of the said debt as carried interest, the different sums composing the said debt and the interest thereof, to be paid in such order, and with such priority, and in such manner, as *Henry Harris* and the lessees might mutually agree on and direct, and, in default of such agreement and direction, as *Harrison* might deem most advantageous for the proprietors of the theatre, taking into view, in the first place, as far as the trust fund would allow, the discharge of debts bearing interest: and, subject to the trusts aforesaid, it was provided, that the reserved rent of 10,500*l.*, and trust-monies, should be paid to the proprietors of the demised shares, according to their respective shares and interests in the theatre. The lessees, by the agreement, engaged, that no part of the profits of the one eighth share of *Const*, or the estate of *Martindale*, should be paid over, until after the full discharge of the debt, interest, and expences provided for by the trusts, and that, in case they should come to an arrangement with *Const* as to his one eighth, it should, as between the parties thereto, be accounted for at the like rate of rent as was thereby agreed on, and that, from time to time, as *Harrison* should receive any payment in respect of the reserved rent, *Const*, or the estate of *Martindale*, should be applied to for a sum equal to one seventh of every such payment, to the intent, that all the proprietors of the theatre might bear an equal proportion of the existing general debt on account of the theatre: They also engaged, that, at the determination of the term, all the original, substituted, and additional chattels should be left with the theatre, without prejudice to, or the same being delayed by, any claim on the part of *Const*, or the

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estate of *Martindale*, in respect of his or her share of the same, at the date of the agreement, at which time, full possession was stated to have been delivered by *Henry Harris* to the lessees, without prejudice to any claim on the part of *Const*, or the estate of *Martindale*. The agreement then provided, that the trust monies should, from time to time, be paid into the banking-house of *Stephenson*, *Remington*, and Company, or such other banking-house as *Henry Harris*, the lessees, and *William Harrison* might, from time to time, mutually fix upon, and that all payments to be made out of such monies, should be made by cheques of *Harrison* on such banking-house, and that, without the intervention of the parties thereto; and that, until the determination of the said term of ten years, or until the liquidation of the then present existing general debt due from the proprietary of the theatre, and the interest and expenses thereof, according to the trusts, *Henry Harris*, his executors, administrators, and assigns, should, notwithstanding any thing therein contained, or to be contained in the lease, receive the rents of the private box, before mentioned to have been let for alternate weeks, and of the fruit-rooms, and also the oratorio rent, and should retain, and be entitled to retain, such rents, so far as they should not exceed the yearly sum of 1360*l.*, the then amount thereof, and should pay any surplus, beyond the said sum of 1360*l.*, to the lessees; and that the lessees should, in like manner, be entitled to have the whole amount of the said last-mentioned rents, after *Henry Harris* should cease to be entitled to receive the same exclusively; and, after reserving to *Henry Harris* and the lessees, a power to lease the premises so let at 1360*l.*, it was provided, that, on *Henry Harris* ceasing to be entitled exclusively to receive the rents of the said premises, five twelfths of the monies which he

should have received out of such rents, with interest on such five twelfths from the time of the same being received, should be secured to be paid to the other proprietors, according to their respective shares, by equal annual instalments, and that such instalments should be secured by charge on *Henry Harris's* shares in the theatre, and on such shares only, it being intended that *Henry Harris* personally, or his estate, other than the said shares, should not be liable to the payment of the same. There were further provisions in the agreement, that all engagements made on behalf of the proprietary, with performers, authors, or servants, should be taken to by the lessees; that *Henry Harris*, and his estate, except his share in the rent and the trust monies, should, during the term, be indemnified by the lessees, from the general debt due from the general proprietary of the theatre, and the interest thereon, it being the intent of the parties, that such debt and interest should be fully paid and satisfied out of the said rent, and out of the proceeds of the share of *Const*, or the estate of *Martindale;* that *Henry Harris* should also be indemnified by the lessees, from any claims or suit by *Const*, in consequence of the possession being given up to them, and that he should likewise be indemnified by the lessees, from any engagements to be entered into, and from any debts or liabilities to be contracted or incurred by them, in the course of their conducting and managing the concerns of the theatre from the day of the date thereof; that the expenses of all parties relating to the agreement, and to the lease, should be paid by the lessees in the first instance, and should be added to the existing general debt due from the proprietors of the theatre, and paid accordingly; and that until the lease should be executed, the demised shares and premises should be held by the lessees, in like manner as if the lease had then been executed.

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The bill was filed on the 15th of *April* 1823, by *Francis Const*, against *Henry Harris*, *Charles Kemble*, *James Trotter*, *William Harrison*, *John Saltren Willett*, and *John Forbes*. After stating the deed of the 9th of *March* 1812, it stated, that *Brandon*, during his treasurership, applied the income of the theatre according to the trusts of that deed, and that the debts due upon the said bills of exchange and bonds were thereby much reduced, but that a considerable portion of such debts still remained unsatisfied. It then proceeded to give a detailed account of the income of the theatre, alleging the rent of the private boxes, and of the fruit-rooms, and the oratorio-rent, to be part of the general receipts and profits of the theatre, and, as such, applicable according to the trusts of the said deed of the 9th of *March* 1812. It then traced the devolution of the shares of the parties who were interested in the theatre when that deed was executed, alleging, that the defendants *Willett* and *Forbes* had become entitled to *George White's* share, as well in respect of the rights vested in their respective wives, as, by virtue of some agreement or arrangement made by them with the executors of *White*; and, after noticing the disputes with *Harris*, and the treaty for the agreement of the 11th of *March* 1822, it alleged, that the Plaintiff took no part in the said disputes, and that, having merely a beneficial life interest in his eighth part of the theatre, and being unwilling to commit himself in the execution of his duties as executor of the said *Ann Martindale*, he refused to become a party to the agreement. It then proceeded to state, that the agreement was concluded between the other parties; that, upon the same being concluded, the Defendants *Kemble*, *Willett*, and *Forbes*, entered into the possession of the theatre, and took upon themselves the entire management and conduct of the concerns thereof; that, for nearly a century previous to the said last

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named Defendant's undertaking the management of the concerns of the theatre, it had been the invariable custom, for the treasurer for the time being of the theatre, every day, during the continuance of each season, on which the theatre was open, to make out an account, containing the amount of the receipts of the theatre on the previous night, and of the daily payments made on account of the expences of the theatre, and that such account was afterwards printed, and a printed copy thereof sent to each of the proprietors; that, for some time after the commencement of the management of the last named Defendants, the printed daily accounts continued to be furnished as usual to the Plaintiff; and that, shortly after the commencement of the said management, the Plaintiff discovered, that great part of the receipts of the theatre, instead of being applied according to the deed of the 9th of *March* 1812, was, in violation of the covenants contained in that deed, grossly misapplied to other purposes, and, amongst other instances of such misapplication, it particularly referred to the receipt by *Henry Harris* of the rents of the private box, and fruit-rooms, and of the oratorio-rent, by the agreement of the 11th of *March* 1822 reserved to him. It then went on to state, that, in order to enable them to make such misapplication of the receipts of the theatre, the Defendants *Kemble*, *Willett*, and *Forbes*, soon after they undertook the management of the theatre, dismissed *Brandon*, who had given security for the due application of the receipts of the theatre according to the deed of the 9th of *March* 1812, from the situation of treasurer, and appointed *Robertson* to be treasurer in his place, and that *Robertson* had given no security, and applied the receipts according to the direction of the last named Defendants, and without any regard to the provisions of the last-mentioned deed; and it further stated, that it had always been customary for the pro-

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prietors to ensure the theatre, to an amount at least sufficient to satisfy the outstanding liabilities, but that the theatre was not then insured; and after charging that, in *January* 1823, the Defendants ordered *Robertson* not to furnish the Plaintiff with the usual daily accounts, under the pretence that the Plaintiff might at any time attend at the theatre and inspect such accounts, it further charged, that, as one of the proprietors of the theatre, the Plaintiff was entitled to have such accounts sent to him daily for his examination, but that *Robertson*, in obedience to the orders of the Defendants, had not sent to the Plaintiffs any such accounts since the 22d of *January* 1823, and had not, though required so to do, sent to the Plaintiff the annual account made up to the end of the last season, as had been usual and customary. The prayer was, That the Defendants might be decreed to abide by, and specifically to perform, the several agreements and covenants contained in the indenture of the 9th of *March* 1812; and that such agreements might be carried into execution under the direction of the court; that accounts might be taken of the debts, provided for by that indenture, which then remained unsatisfied, of the produce and profits which had arisen and been received from the theatre, since the Defendants removed *Brandon* from being the treasurer or receiver, and of the application of such produce and profits; that all the Defendants who had received, or concurred in the receipt and application of such produce and profits, might be declared to be personally liable to make good the sums so received, in so far as the same had been applied and appropriated to purposes inconsistent with the provisions and agreements of the said indenture; and that the Defendants might be restrained from applying, or permitting to be applied, any of the rents, issues, produce, and profits of the theatre and other premises, to any other purposes, than such as

were provided and agreed upon by the said indenture; and that a receiver or treasurer of the theatre might be appointed, with proper directions for enabling him to receive, and apply such rents, produce, and profits, according to the trusts of such indenture; that, when and as the said debts should be paid and satisfied, the Plaintiff, and the several other persons entitled thereto, might be let into possession, and receipt, and enjoyment of their respective proportion of the rents, produce, and profits of the theatre; and that, in the meantime, the Defendants might be restrained from conducting and managing the concerns of the theatre, contrary to, or in violation of, the provisions and agreements contained in the said indenture, and from excluding the right of interference on the part of the Plaintiff, as reserved by the terms of the said indenture, to each and every the proprietors of the theatre; and if necessary, that a proper person might be appointed to have the management and conduct of the concerns of the theatre, until, all the said debts, provided for by the said indenture, should have been fully paid and satisfied.

On the 30th of *April* 1823, the Defendants *Kemble*, *Harrison*, *Forbes*, and *Willett*, put in a demurrer to the bill, assigning as causes of demurrer, first, that *Elizabeth Percy*, and *Letitia Mary*, the wives of the Defendants *Willett*, and *Forbes*, and, secondly, that the parties entitled in remainder under the will of *Ann Martindale*, were not made parties to the suit; and on the 5th of *May* 1823, a similar demurrer was put in by the Defendant *Trotter*.

On the 3d of *May* 1823, the Plaintiff gave notice of a motion, before the Vice-Chancellor, for an injunction, to restrain the Defendants from applying, or permitting to be applied, any of the monies to be received for or in

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respect of the theatre, and other the premises in the pleadings mentioned, to any other purposes, than such as were provided and agreed upon in and by the said indenture of the 9th of *March* 1812, and for a reference to the Master to appoint a proper person or persons to act, as, or in the nature of, a receiver and treasurer of the theatre, under the authority of the Court, for the purpose of receiving the monies, which should from time to time be received for admission to the theatre, or become or be payable in respect of the rents in the pleadings mentioned.

The motion was opened before the Vice-Chancellor, on the 9th of *May* 1823, and was refused with costs (*a*). On the same day, the Plaintiff, gave notice of a motion, before the Lord Chancellor, that the Vice-Chancellor's order of the 9th of *May* might be discharged, and that an order might be made according to the original notice of motion.

The allegations of the bill were verified by an affidavit of the Plaintiff, in support of the motion. The Defendants *Kemble*, *Willett*, and *Forbes*, by an affidavit, in opposition to the motion, stated, that they were ignorant of the existence of the deed of the 9th of *March* 1812 until the filing of the bill, and that they believed that the said deed had not been acted upon for many years, but had been considered as dormant, and as a dead letter, by the parties thereto, the material purposes for which the same had been made having been long since carried into effect; and they said, that they believed that all the bills

(*a*) The merits of the case were not discussed before the *Vice Chancellor*, but His Honour refused the motion, upon the ground, that the pendency of the demurrers prevented it from being made; and also refused to permit the demurrers to be advanced, and heard with the motion, unless special cause was shewn. See *Jones* v. *Taylor*, 2 *Madd. Rep.* 181.

of exchange, and bond debts, provided for by the said deed, had been paid, except a small part of the bond debts, for the payment of which arrangements had been made, and time given; they further stated, that several meetings took place, pending the disputes with *Henry Harris* referred to by the bill, that the Plaintiff personally assisted at one of those meetings, and that, before the 11th of *March* 1822, the Plaintiff was apprized of the substance and result of the other meetings, and of the arrangement finally made with *Henry Harris*, and they said, that the Plaintiff expressed no dissatisfaction at the nature of the said arrangement, but acquiesced in and approved of the same, so far as it bound the parties thereto: they also stated, that applicatiou was made to the Plaintiff to become a party to the said arrangement with *Henry Harris*, and that, when he declined so to do, he from time to time stated, that he was merely the executor of *Ann Martindale*, and that he would not do, or join in any act, whereby he might make himself personally liable, or further liable than the assets of *Ann Martindale* might make him, and that the Plaintiff had expressly stated, that he would not be a proprietor or partner in the theatre, or its concerns, and had and would purposely avoid being or becoming a partner or proprietor therein, and they said, that in *March* 1822, some of the creditors of the theatre having become pressing for their demands, the Plaintiff was informed that an advance of money on the part of the proprietors would be necessary, and that the Plaintiff then refused to make any advance; they stated, that the material object for which the said arrangement with *Henry Harris* was entered into, was, to provide a fund, not liable to contingent expenses, to be applied in liquidation of the general debt due on account of the theatre, and that it had been originally proposed, that a lease of the whole of the theatre should be granted to them, the Defendants, at the clear annual

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rent of 12,000*l.*, but that, in consequence of the Plaintiff's having declined to concur, it was finally arranged, that the lease should be of seven eighths only, at the proportionate rent of 10,500*l.*, and that such rent, and the profits of *Ann Martindale*'s share, or a sum of 1500*l.* as a rateable sum in respect of her one eighth, should be applied in liquidation of the debt; and they said, that the rent of 12,000*l.* a year was a competent and sufficient rent for the theatre, and that the actual profits, from *March* 1822, had not been equal to that rent; they then stated, that *Thomas Harris*, whilst he was manager of the theatre, had been allowed 1000*l.* a year for the trouble of management, pursuant to an agreement signed by *Ann Martindale* and other proprietors, and that *Henry Harris* had retained the like annual sum during his management, and that, by the arrangement which they had made, the theatre had been exonerated from that charge; and they said, that, with the exception of the rents received by *Henry Harris* under the arrangement, the whole of the receipts of the theatre, from the 11th of *March* 1822, had been applied to the payment of the current expenses of the theatre, and of the debts due from it previous to the said 11th of *March*, and that the amount of such debts had been thereby greatly reduced, and that the Defendants *Willett* and *Forbes* had also, since the said 11th of *March*, made large advances, out of their own private monies, in payment of the said debts: they denied any improper motive in dismissing *Brandon* from the treasurership, and said, that he had been dismissed in consequence of his having been found incapable of doing his duty personally, and that the Plaintiff had recommended his dismissal, and that, at the time of such dismissal, they, the Defendants, were not aware of the existence of the deed of 1812, or that *Brandon* had given any security for the application of the receipts of the theatre,

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and that the Plaintiff had never given any intimation of the existence of any such security. The statement of the affidavit of the Defendants, as to the daily printed accounts, was, that since they, the Defendants, had undertaken the management of the theatre, such accounts had not been furnished to any of the proprietors, except the Plaintiff, and that the delivery of such accounts had been discontinued, in consequence of its having been discovered that the same had been made public, and had been known to several persons connected with *Drury Lane* theatre, but the affidavit stated, that the said daily accounts were regularly made out, and kept at the treasury office of the theatre, and that the Plaintiff had the power of informing himself fully of the accounts and transactions of the theatre, by attending at the said office, where all the books and accounts were open for his inspection, and that the Plaintiff had had notice to that effect, and, since the suspension of the delivery of the daily accounts, had personally attended at the theatre, and inspected the books; after further stating, that, in the course of their management, they had paid the current expenses and outgoings of the theatre, in due course, and according to the custom and practice thereof, and the credit usually given, and that there was no debt owing in respect of the said current expenses and outgoings, except such, as, according to the aforesaid custom, practice, and credit, were not then due, the said Defendants, by their affidavit, said, that it had never been their wish to prevent the Plaintiff from superintending the concerns of the theatre, but that, on the contrary, they had frequently applied to him for his advice and assistance.

May 12.

Upon the motion being opened, the counsel for the Defendants objected to its proceeding until the demurrers were disposed of; and the *Lord Chancellor* said,

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that, according to his recollection, it had been held, that if a bill was filed to stay irreparable waste, and a demurrer was put in, the motion to stay waste could not be proceeded with until the demurrer was got rid of, but the Court would hear the demurrer immediately. The counsel for the Plaintiff however submitted, that the rule in question applied only where the bill was demurred to generally for want of equity, and did not reach the case before the Court, where the demurrer was for want of parties merely. The papers were then handed up to the *Lord Chancellor*, who, this day, said, he thought that the wives of the defendants *Willett* and *Forbes*, were necessary parties to the suit, but that he would hear counsel upon the question whether, notwithstanding that might be the case, the injunction might not be granted: that he had not made up his mind whether the motion might not prejudice the parties pointed at by the demurrer: that, supposing it to be clear that there was a case for the injunction, and that the injunction would operate for the benefit of the parties not before the Court, he was far from thinking that the Court would, on account of the absence of those parties, hesitate to do what it could for them.

Where a bill is filed to stay waste, and a demurrer is put in, the Court will hear the demurrer immediately.

May 31.

Where there is a case for a special injunction, and the injunction will operate for the benefit of parties not before the Court, the absence of those parties, though made the ground of demurrer to the bill, will not prevent the Court from interposing.

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The motion then proceeded. It was twice argued by Mr. *Hart*, Mr. *Wetherell*, and Mr. *Rawlins*, for the Plaintiff; and Mr. *Heald*, Mr. *Shadwell*, Mr. *James*, and Mr. *Twiss*, for the Defendants.

After the first argument, the *Lord Chancellor* again expressed his opinion, that the wives of the defendants *Willett* and *Forbes*, were necessary parties to the suit, but, with respect to the other ground of demurrer, he said, that the bill had so stated the Plaintiff's executorship,

Where an executor has not assented to a specific bequest, the per-

without stating for what persons he was to be trustee, that he could not consider him to have assented to an interest in the *cestuisque trust*, and divested himself of the interest; and, adverting to the argument that the pendency of the demurrers prevented the motion from being made, his Lordship said, that he could conceive many cases, requiring immediate interposition, where application might be made to the Court, notwithstanding the absence of some of the parties, and that it was upon that conception he had permitted the motion to be made (*a*).

sons beneficially entitled are not necessary parties to a suit relating to the property specifically bequeathed.

In support of the motion, it was contended, on the part of the Plaintiff, that he had been ousted by the Defendants from all the rights, which, as a proprietor of the theatre, he was entitled to exercise: that the agreement of 1822 utterly destroyed the equal right of interference which ought to have existed in all the proprietors, and was framed for the express purpose of destroying that right, and vesting in the lessees the entire dominion over the theatre: that every provision in that agreement tended to exclude the Plaintiff's interference, and was in direct contravention of his rights: that the dismissal of *Brandon* from the office of treasurer, and the non-delivery to the Plaintiff of the daily accounts, were parts of the same system: that the Plaintiff had a clear right to be furnished with those daily accounts, and that the practice which had existed of their being delivered to the proprietors must be adhered to, or, at all events, that the Defendants were not justified in discontinuing that practice without communicating with the Plaintiff: that all the parties were bound by the provisions of the deed

(*a*) It does not appear that any order allowing the demurrers was ever drawn up, or that the necessary parties were brought before the Court until after the motion was disposed of: on the 9th of *March* 1824, the Plaintiff obtained an order to amend, on payment, of 20*s.* costs in respect of the amendments, and of 10*l.*, the costs of setting down the demurrers.

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of 1812, and that the Defendants could not be permitted to destroy those provisions by the agreement of 1822: that no person, succeeding to a share in a partnership, could exempt himself from the obligation of performing the engagements which attached upon the partner to whom he succeeded, under the plea that he was ignorant of such engagements; and that the alleged ignorance, on the part of the lessees, of the deed of 1812 did not therefore affect the case.

On the part of the Defendants, it was insisted, that, as the bill did not pray that the concern might be wound up, the motion could not be granted, consistently with the decided cases; *Waters* v. *Taylor* (*a*), *Forman* v. *Homfray* (*b*), *Goodman* v. *Whitcomb* (*c*); *Marshall* v. *Colman* (*d*): That the acquiescence of the Plaintiff amounted to a consent on his part, to the abandonment of the provisions of the deed of 1812, and a substitution of the arrangement made by the agreement of 1822, and was, of itself, sufficient to prevent the summary interference of the Court: That the Plaintiff, having renounced the character of a partner, could not call upon the Court for protection against his co-partners, and that the agreement of 1822 was operative only between the parties to it, and did not at all affect the Plaintiff. The non-delivery of the daily accounts was justified under the circumstances appearing by the affidavits; and it was urged, that it was the Plaintiff's duty to attend at the theatre, and inspect the accounts.

In reply it was said, that the Plaintiff had only abstained from applying to the Court, so long as he had been furnished with the daily accounts, from which he could judge of the state of the concern; and that, after the

(*a*) 15 *Ves.* 10.
(*b*) 2 *V. & B.* 329.
(*c*) 1 *Jac. & Walk.* 589.
(*d*) 2 *Jac. & Walk.* 266.

agreement of 1822, any attempt at interference, on the part of the Plaintiff, would have been wholly useless.

The following observations fell from the *Lord Chancellor*, in the course of the argument, and on several occasions when the case was mentioned: —

That the Court would never take any partnership concern into its own hands by a receiver, and much less by a manager, unless the suit was so framed, as that a decree could be made at the hearing, either that the concern should be carried on according to the terms of some instrument, which, by the agreement between the parties, was to regulate the mode of its being carried on, or, that it should be wholly put an end to: that articles, which had been agreed on to regulate a partnership, could not be altered without the consent of all the partners; but that, if alterations were made by some of the partners, and acquiesced in by all, the Court would hold that to be an adoption of new terms: that it must be considered, whether the Plaintiff had not conceived himself at liberty to withhold more of his personal attention from the concern, than he could withhold, entitling himself to call upon the other partners to do their duty: that, where a person, interested as the Plaintiff was, proposed to do every part of his duty to the other parties interested, the Court would compel those other parties to do their duty towards him, but that, if he chose to discharge his duty towards those other parties in a more limited way, the question would be, whether that circumstance did not destroy his right to call upon them to do their duty towards him? With respect to sending the daily accounts, his Lordship said, that he did not find it stipulated for in any of the instruments; that it was a practice which seemed to have prevailed for a great length of time; but that it was not provided for by

The Court will not appoint a receiver, or a manager, of any partnership concern, unless the suit be so framed, as that a decree may be made, either that the concern shall be carried on, according to the terms of an instrument, which, by the agreement of the parties, is to regulate the mode of its being carried on, or that it shall be wholly put an end to.

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covenant; that where there were no stipulations, no covenants, with respect to a particular practice, it followed of necessity, that the majority of partners must decide, whether that practice should be continued or discontinued; and that if the minority had a proper opportunity given them of considering the matter, their negative would be of no avail: that there could be no doubt about the general annual accounts, as they were matter of express declaration in the original deed: that, in cases where a majority could bind the minority, if some of the partners were to agree, that they would, by a majority, bind the others, that, let one of them say what he would with respect to the interests of the partnership, they would over-rule him, the Court would compel them to rescind that agreement, and say, that was a length to which they should not go; the Court would not allow the rules applying to partnership concerns to be broken in upon by an agreement of that sort: that, supposing the Plaintiff had a right to have the daily accounts delivered to him, it did not follow that the Court would interfere; that the Court was not bound to interfere upon every breach of adherence to the rules of a partnership concern.

But, the continuance or discontinuance of a practice, not stipulated for, or made the subject of covenant, must be decided by the majority of the partners.

The negative of the minority in such cases of no avail, if they have had a proper opportunity of considering the matter.

An agreement by a majority of partners, to over-rule the minority, will not be permitted.

The Court will not interfere on every breach of adherence to the rules of a partnership concern.

Feb. 6, 7. The LORD CHANCELLOR went through the facts of the case, and in so doing observed, that the concern was in the nature of a partnership, that, according to the principles of the Court, it would not interfere, on interlocutory motion, to regulate the concerns of any partnership, unless the objects of the bill were such, as would probably be carried into execution, when the cause came to a hearing: that it was not the business of the Court, to manage or carry on, from time to time, a partnership of any kind, and that it was impracticable for the Court to do so;

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A bill merely seeking the interposition of the Court to carry on a partnership cannot be maintained.

that a bill might be filed, for the purpose of compelling partners to do certain things, according to the provisions of certain instruments, and that the Court would interfere for that purpose, and that when it did so interfere, it would take care that the decree, to be made at the hearing of the cause, should not be defeated by any thing done in the mean time; but that a bill, merely seeking the interposition of the Court to carry on a partnership, could not be maintained: that, supposing nothing more to have taken place, than, that the deed of 1812 having been executed, *Thomas Harris* had, with the consent of all the parties, taken the entire management of the theatre, and *Henry Harris*, with the same consent, had succeeded to the same species of management, and that, disputes having then arisen, in consequence of the introduction of new partners, the bill had been filed, the Court must have taken upon itself the management; and that, if there had been nothing, beyond what he had stated, except a simple demise by *Henry Harris* to the other parties, it would have been impossible for the lessees to stand in any other situation, than the person by whom the demise was made, clothed with all the rights, and subject to all the duties and obligations, created by the deed of 1812; that it would have been nothing more in effect, than a substitution of the new parties as partners for ten years; that, unless the terms of the deed of 1812 were varied, by the consent of all the parties, bound by its obligations, and entitled to its benefits, the new partners would be entitled to all the rights, and subject to all the obligations, contained in that deed: with respect to the delivery of the daily accounts, his Lordship observed, that he thought it was competent to the proprietors of the theatre, meeting together, and deliberating upon the subject, to determine that such accounts should not be sent; that the delivery of these accounts could not be stopped, without all the

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partners being consulted; but that, if all had been consulted, the practice had been properly discontinued. In commenting upon the agreement of 1822, his Lordship said, with reference to the covenants applying to the entirety of the premises, that, there being seven eighths of the whole property vested in the lessees, and they standing, for ten years, in *Harris*'s place, it was not improper on his part to require such covenants, leaving the lessees to deal with their partners as they could; but, referring to the clauses, as to debts which were to be considered as due from the proprietors, though incurred by the parties to the agreement only, and particularly to the clause as to the printing-press, his Lordship said, that the debts might properly be considered as debts due from the proprietors, including the Plaintiff, provided they were debts, which ought to be thrown upon the proprietors, and were incurred, after a proper communication with the Plaintiff as to the propriety of their being incurred; but that, *primâ facie*, the Plaintiff had an undoubted right to be consulted on that proposition; and that, as to the printing-press, the Plaintiff had a right to be consulted upon the question, whether any should be set up; and that no debt in respect of it could ever be thrown on the general body of the proprietors, unless a decision, in favour of its being set up, was come to, on the proper principle on which all points, for the consideration of all the partners, were to be considered and decided upon; and he said, that, taking the whole instrument together, it was an instrument, with respect to which, as to many parts of it, it was extremely difficult to say, that the partners of the seven eighths could enter into it, without consulting the partner of the other eighth, but, that the instrument seemed to him to go to the utter destruction of the deed of 1812; that it provided, in many instances, for an application of the funds, different from the application directed by that deed, by which the

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application of the rents and profits, including those taken by Mr. *Harris* under the instrument in question, was irrevocably fixed; and that, therefore, if the question had arisen immediately after the execution of the instrument, whether it could be carried into execution, consistently with the deed of 1812, the instrument could never have been permitted by the Court to over-rule the deed, unless upon some other ground, than that the parties to the instrument were ignorant of the deed: that, if the instrument was entered into in entire ignorance of the deed of 1812, it might be good ground for the lessees to say to *Harris*, that he should not hold them to the agreement, as he had not informed them of the nature of the property, or of the obligations to which he was subject by the deed of 1812; but that, it never could be said, that without the consent of all parties, the execution of the agreement could, upon the mere ground of ignorance, entirely destroy the obligations contracted by the deed of 1812: that the parties claiming under the agreement could take nothing more than Mr. *Harris* could give them; and that they therefore took, subject to all that Mr. *Harris* would have been subject to had the agreement not been made: that a party, taking the interest of a partner in a concern, could not be let loose from the obligations the partner was under to the concern; and that, if he chose to ask no questions, he must take at his own risk with respect to those obligations. In noticing the fact, that arrangements had been made, and time given, for such of the debts secured by the deed of 1812 as remained unpaid, his Lordship said, that that would not do; that without the consent of all the parties, other securities could not be substituted for that, which was the primary security.

A party, taking the share of a partner in a concern, cannot be let loose from the obligations that partner is under to the concern.

His Lordship then proceeded to the consideration of the case, as it stood in 1812, and as it was affected by what had subsequently happened.

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I have never seen a deed, which more irrevocably fixed upon the parties, whose interests were to be bound, the trusts created by it, than the deed of the 9th of *March* 1812; it expressly directs, that the funds shall be exclusively applied to the particular purposes there pointed out, and that the treasurer shall be irrevocably directed so to apply the funds: at the same time, great difficulties might have arisen upon that deed, from its not providing who should be the manager of the theatre: suppose a manager to have been appointed by some of the persons concerned in the theatre, without duly consulting the others, it would have been a much shorter way than filing a bill in equity, to have stated to that manager, that he had no right to manage, and to have stated to the treasurer, that he acted at his peril in applying any of the funds according to the orders of the manager: the same difficulty would then have presented itself as occurred in the case of the Opera House, that, when the treasurer came to pay the performers, a question would have arisen, whether the person who had made the bargain with them had any authority to make it: so, in the present state of things, a question may arise, whether, if the present management is a management, which has not been properly created originally, or properly sanctioned subsequently, Mr. *Robertson* will be justified in executing the very first trust of this deed, unless it can be shewn, that the contracts with the performers are contracts, which bind all the persons interested: however that may be, there can be no doubt whatever, that after the execution of the deed of 1812, unless the trusts of it were altered by some effectual means, it never could be competent to any of the proprietors of the theatre, without the consent of the others, to authorise *Brandon*, whilst he acted under the deed, to apply any part of the monies coming to his hands, to any other purposes than those expressed in the deed: con-

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sidering the deed to have been an effectual deed, it has been the duty of the treasurer for the time being, to say, that, without the consent of all the parties interested, he could not allow any part of the monies coming to his hands, to be applied otherwise than according to the trusts of the deed: if all the parties interested, except one, came to him, and said, he should not apply the monies in the manner directed by the deed, he was authorized to say, that he should make that application of the monies, and that he could make no other application of them: Thus the case stood in 1812.

Partners may be held by their conduct to have changed the terms of a written agreement into which they have entered for carrying on the concern,

In ordinary partnerships nothing is more clear than this, that although partners enter into a written agreement, stating the terms upon which the joint concern is to be carried on, yet, if there be a long course of dealing, or a course of dealing, not long, but still so long as to demonstrate, that they have all agreed to change the terms of the original written agreement, they may be held to have changed those terms by conduct. For instance, if in a common partnership, the parties agree, that no one of them shall draw or accept a bill of exchange in his own name, without the concurrence of all the others, yet, if they afterwards slide into a habit of permitting one of them to draw or accept bills, without the concurrence of the others, this Court will hold, that they have varied the terms of the original agreement in that respect; so, in this case, if it can be shewn, that in the administration of this property, the proprietors in general, after 1812, pursued a different course from that provided for by the deed of *March* 1812, they must be taken to have altered the agreement, and to have substituted the terms, to which, in their conduct, they have adhered, instead of the terms contained in the original agreement; and, with respect to the present Plaintiff, there can be no doubt, that if, after the deed of 1812 was

and to have substituted the terms to which they have adhered, instead of the terms contained in the original agreement.

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executed, his testatrix gave in to a course of administration of the property, different from the course provided for by the deed, if her acts, or the acts of others with her consent, afforded such evidence of departure from the terms of the written agreement, as to amount to the substitution of a new agreement, though evidenced only by parol, instead of the written agreement, he, claiming under her, must be bound by her acts, and cannot be at liberty to revert back from those acts, establishing a new agreement, to call into operation again the old agreement, and to insist, that the non-execution of the old agreement is, in such circumstances, a breach of trust. So again, it is a principle of this Court with respect to partnership concerns, that a partner, who complains that the other partners do not do their duty towards him, must be ready at all times, and offer himself, to do his duty towards them.

Parties claiming under a partner who has assented to the substituted terms cannot revert back to the original terms.

A partner complaining that the other partners do not do their duty towards him must be ready to do his duty towards them.

Where in carrying on a concern there is any material change to be made, notice must be given to all parties of what the change is, and at what time it is to be taken into consideration.

Whether the observation I am about to make applies to this case at present or not, it may be useful for the guidance of these parties hereafter: it is not enough for the parties who have executed the deed of 1822 to say, we, the owners of seven eighths, will meet, and Mr. *Const* may come if he pleases: where there is any material change to be made, which is to be a binding change, notice must be given to all parties of what that change is, and at what time it is to be taken into consideration: For instance, if notice was given with respect to dismissing Mr. *Brandon*, I am not of opinion, supposing the deed of 1812 to have been an operative deed when Mr. *Brandon* was dismissed, that it was not competent to the parties to dismiss him, duly taking into consideration whether he ought to be dismissed or not, and duly providing a substitute, who should be constituted and bound to all the duties Mr. *Brandon* was constituted and bound to, and whose discharge of those duties should be as well secured, as Mr. *Brandon*'s discharge of those duties was secured; but I say, that, supposing the deed of 1812

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to have been then operative, the proprietary could not dismiss Mr. *Brandon* without consulting all their partners: If the deed of 1812 was then operative, his dismissal ought to have been the act of all the partners; and I call that the act of all, which is the act of the majority, provided all are consulted, and the majority are acting *bonâ fide*, meeting, not for the purpose of negativing, what any one may have to offer, but for the purpose of negativing, what, when they are met together, they may, after due consideration, think proper to negative: For a majority of partners to say; We do not care what one partner may say, we, being the majority, will do what we please, is, I apprehend, what this Court will not allow. So, again, with respect to making Mr. *Robertson* the treasurer, Mr. *Const* had a right to be consulted; his opinion might be over-ruled, and honestly over-ruled, but he ought to have had the question put to him and discussed: In all partnerships, whether it is expressed in the deed or not, the partners are bound to be true and faithful to each other: They are to act upon the joint opinion of all, and the discretion and judgment of any one cannot be excluded: What weight is to be given to it is another question: The most prominent point, on which the Court acts, in appointing a receiver of a partnership concern, is, the circumstance of one partner, having taken upon himself the power to exclude another partner, from as full a share in the management of the partnership, as he, who assumes that power, himself enjoys.

The act of a majority of partners is the act of all, provided all are consulted, and the majority are acting *bonâ fide*.

Partners must act upon the joint opinion of all, and cannot exclude the judgment of any one.

The exclusion of a partner from his full share of management the strongest ground for appointing a receiver.

Then, what are the circumstances, upon which the lessees of the seven eighths rely, as having varied, prior to the deed of 1822, and to what extent, and in what particulars, the deed of 1812? With respect to what they state, as to their not having known of the deed of 1812, for the reasons I have already given, I can pay no

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attention to that: What they were bound by law to know they must be taken to have known: Their obligation in law to know of the deed of 1812, cannot be altered by their not having in fact known of it; but, whether they knew of it or not, they cannot take under *Harris* upon better terms, than those upon which *Harris* himself took.

I am willing, however, to agree, that usage may be taken as varying the terms of the deed of 1812; usage, which cannot, of course, be of long continuance, but for this purpose may be of great effect: I am also willing to agree, that the deed of 1812, saying nothing about the appointment of a manager, it must be understood, that managers were thenceforth to be appointed, in the same way as they had before been appointed; and that if, for instance, the appointment of Mr. *Henry Harris* took place without any form whatever, the other parties merely standing by, and seeing him the manager from year to year, in which case I should say, that their non-opposition was their accession to the appointment, a manager now appointed in the same manner, and where there was the same accession to the appointment, would be a perfectly good manager; but, supposing there to have been a manager to be appointed under the deed of 1822, and the lessees of the seven eighths to have appointed the manager, without consulting the parties interested in the one eighth, and the question then to have arisen, whether the manager so appointed was properly appointed, on these naked facts, taking the question to have arisen immediately after the execution of the deed of 1822, I should have said, that the appointment would not do, there having been no subsequent acquiescence, removing the objection of the parties interested in the one eighth not having been consulted; that the lessees of the seven eighths could not, without consulting the

parties interested in the one eighth, take upon themselves, merely because they were lessees of seven eighths, to do those acts, which could only be done by the body, or by a majority of the body representing the whole of the body, and that the majority of the body never represented the whole of the body, except where there had been a voice called for from the minority, and submitted to and fairly over-ruled by the majority, which the Court would generally take it to be where it had been over-ruled: Now all this applies equally to the appointment of Mr. *Robertson*.

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The majority of partners never represents the whole body, except where there has been a voice called for from the minority. The Court will generally take the opinion of the minority to have been fairly over-ruled.

His Lordship then, after adverting to the situation in which Mr. *Robertson* stood, in respect of the questions,—how far he was duly appointed and duly authorized, in any manner, to receive or apply the funds of the theatre, and in what application of those funds he would be safe, and particularly noticing, that he could not think Mr. *Robertson* would be safe in paying to Mr. *Harris* the 1360*l*. *per annum*, — proceeded to observe, that he could not find, that there had been that sort of acquiescence by the Plaintiff, which precluded objection on his part; that, unless the deed of 1812 could be argued to give Mr. *Brandon* a freehold for life in the office of treasurer, it was competent to the parties, acting towards each other as they ought to act, to dismiss Mr. *Brandon*, and to appoint another treasurer, and that the deed itself, speaking of the treasurer for the time being, raised that implication; but that, if the parties were to be considered as acting under the deed of 1812, they could not act under that deed, in the appointment of a treasurer, without calling the whole of the proprietors together, and taking into consideration who that treasurer should be; that, unless something further could be stated, to oust the reasoning, as to the non-accession of the Plaintiff to the

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new state of things under the deed of 1822, and, unless the deed of 1822 was to be taken to be the leading deed, and to have excluded the Plaintiff from all interference whatever, he could not get rid of the opinion, that Mr. *Robertson* could not be considered as treasurer, and that all the parties were to be considered as partners, having a demand upon each other for that intercourse, which the Court enforces between partners; that, if the conclusion was, that Mr. *Robertson* was not the treasurer, and that the deed of 1812 could not be displaced, the Court must appoint a treasurer, unless the parties would appoint one, according to the true intent and meaning of what must regulate their partnership; but that, as there had been a miscarriage in the appointment of a treasurer, by the judgment of a person having been excluded, whose judgment ought to have been taken, the most advisable thing to be done, considering the nature of the concern, was, for a meeting of the partners to be called to appoint a treasurer.

His Lordship accordingly desired, that a meeting of the partners should be called to appoint a treasurer, and that the Court should be informed of what passed at that meeting; and, observing that if what then passed was not satisfactory the Court must appoint a treasurer, His Lordship ordered, that, in the mean time, there should be no application of the income of the theatre, contrary to the deed of 1812.

Feb. 19.

A proprietor of a theatre having demised his share

The matter was again mentioned, and it was stated, that no arrangement had been made, and that Mr. *Harris* had declined to attend any meeting, considering that, having demised his share, he had no interest in the question, and was bound to accede to whatever the lessees agreed upon among themselves; but, the *Lord Chancellor* asked, whether Mr. *Harris*, having made a lease

of his interest without the consent of one of his partners, might not apply for an injunction, to restrain his lessees from doing any act prejudicial to that partner. His Lordship then referred it to the Master to appoint a Receiver.

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without the consent of his co-proprietor may obtain an injunction to restrain his lessees from doing any act prejudicial to such co-proprietor. *Semble.*

1825.

APPENDIX.

1825.
March 6. 11.

FILLINGHAM *v.* BROMLEY.

Devise of several estates to *A.* for life, with remainder to trustees to preserve contingent remainders, with remainder to the first and other sons of *A.* in tail male, with divers remainders over, with power, to the persons from time to time entitled to the estates devised, to lease all such estates, except an estate called *Juts;* and with a direction, that the persons, who should be entitled to and possessed of the devised estates, should not lease the estate called *Juts*, or any part thereof, and that every such person should live and reside on the said estate called *Juts;* and for default thereof, all the devised estates to go over to the person next in succession, as if the person refusing or neglecting to reside or live at *Juts* was actually dead.

Held, in a suit, by parties making title under a recovery suffered by *A.* and his eldest son, against a purchaser, for specific performance, that it was too uncertain what the testator meant by the words live and reside for the Court to determine that there had been a forfeiture and a specific performance decreed.

THIS suit was instituted for the specific performance of an agreement, entered into by the defendant, for the purchase of some property, formerly part of an estate called *Juts*, in the parish of *St. Stephen*, in the county of *Cornwall*.

The Plaintiff's title to the property in question was deduced in the following manner: *Pendock Neale*, by his will, dated the 13th of *November* 1768, gave and devised the said estate called *Juts*, together with divers freehold estates, situate in the county of *Nottingham*, subject to certain rent-charges, to his nephew *Pendock Neale* for life, and after the determination of that estate by forfeiture or otherwise in his lifetime, to trustees and their heirs during the life of the said *Pendock Neale*, upon the usual trusts for preserving contingent remainders, and to permit the said *Pendock Neale* to receive the rents during his life, and after his decease, to the first and other sons of the said *Pendock Neale*, severally and successively, in tail male, with remainder, to the brothers of the said

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Pendock Neale, severally and successively, in tail male, with divers remainders over; and he willed and directed, that it should be lawful, for all and every person and persons, who, by virtue of any of the limitations thereinbefore contained, should, from time to time, be entitled to the lands and hereditaments thereinbefore devised, if of full age, but if not, for their respective guardians, to demise or lease, in possession, the said premises, or any part thereof, for any term not exceeding twenty-one years, at the best rent that could be reasonably obtained for the same, (except his aforesaid estate called *Juts*), it being his will, and he did thereby direct, that such person or persons, who should be entitled to and possessed of the said lands and hereditaments, should not set, let, or lease out the said estate called *Juts*, or any part thereof, and that every such person or persons should live and reside on the said estate called *Juts*, and for default thereof, he gave and devised all his said lands and hereditaments to such person, who should be the next entitled to the possession of the same, by virtue of any devise or limitation in the said will, as if such person, so refusing or neglecting to reside or live at *Juts* aforesaid, had been actually dead, any thing in his said will contained to the contrary notwithstanding. *Pendock Neale* the testator died in 1772, leaving *Pendock Neale* the devisee an infant: *Pendock Neale* the devisee attained twenty-one on the 27th of *August* 1778, and he afterwards married, and had issue *Pendock Barry Neale*, his eldest son, who was born on the 6th of *May* 1783: In *Trinity* term 1804, *Pendock Neale* and *Pendock Barry Neale* suffered a recovery of the property in question, and they afterwards sold and conveyed it to the plaintiff: the grantors in the deed for making the tenant to the precipe, upon the recovery being suffered, were *Pendock Neale* and *Pendock Barry Neale*.

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By the decree made upon the hearing of the cause, on the 7th of *March* 1816, it was referred to the Master to inquire, whether the Plaintiff could make a good title to the premises comprised in the agreement; and, on the 8th of *June* 1818, the Master reported in favour of the title.

The Defendant excepted to the report, and, on the hearing of the cause upon the exception and for further directions, on the 16th of *July* 1818, it was referred back to the Master to inquire, whether, previous to the recovery being suffered in *Trinity* Term 1804, there had or had not been a forfeiture or forfeitures of the estate and premises in question, by not complying with the terms of the will of the testator *Pendock Neale:* And it was ordered, that the Master should state the evidence upon which his conclusion was founded, and that the exception should stand over in the mean time.

On the 17th of *February* 1819, the Master made his further report, stating, that upon consideration of the will of the testator, and of the evidence laid before him, respecting the residence of the said *Pendock Neale* the devisee upon the said estate called *Juts*, he found, that previous to the recovery being suffered in *Trinity* term 1804, there had not been any forfeiture of the estate and premises in question, by not complying with the terms of the said testator's will; and, in a schedule to his report, he set forth the evidence upon which he had come to such conclusion. By the evidence contained in the schedule to the report it appeared, that, for about two years next after he attained twenty-one, *Pendock Neale* the devisee was living and residing, and described himself as living and residing at *Juts;* that he then went into *Nottinghamshire*, where he remained for about a year, when he returned to *Juts* with his wife, whom he married in the interval, and that, whilst he was absent

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from *Juts* upon that occasion, his servants there were upon board wages; that after he had returned to *Juts* with his wife, he continued to live and reside, and describe himself as living and residing there, for about another year, when, for the purpose of his wife's confinement, he again went into *Nottinghamshire*, where *Pendock Barry Neale* was born; and that from the time of his quitting *Juts* on the last-mentioned occasion, he discontinued to live and reside, or to describe himself as living and residing there, except that he was in the habit of coming there occasionally, for a few weeks or months, sometimes with, and sometimes without, his family and establishment; it appeared however, that he had at all times two or three servants at *Juts* on board wages, and that he was assessed to the poor-rates, as the occupier of *Juts*, from 1778 to 1790, and for some years subsequent thereto: there was no evidence as to the residence of *Pendock Neale* the devisee, from the death of the testator until he attained twenty-one, except that one witness deposed, that she used to see him in the neighbourhood of *Juts*, and understood that he was residing there with his mother.

The Defendant took another exception to the Master's further report, insisting, that the Master ought to have found, that, previous to the recovery being suffered, there had been a forfeiture or forfeitures of the estate and premises in question, by not complying with the terms of the testator's will. On the 11th of *March* 1819, the cause was heard before the *Vice-Chancellor*, on the two exceptions, and for further directions, when his Honour ordered, that both the exceptions should be overruled, and declared, that the agreement ought to be specifically performed, and decreed accordingly.

From this order the Defendant appealed to the *Lord Chancellor*, and the cause now came on upon the appeal.

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Mr. *Heald* and Mr. *Pepys*, for the appellant.

The objection to the title is, that before the recovery was suffered, there was a forfeiture by non-compliance with the terms of the testator's will, and that in consequence of the forfeiture, *Pendock Neale* the devisee and *Pendock Barry Neale* could not legally suffer the recovery: the evidence makes out, that *Pendock Neale* did not live and reside at *Juts*, according to the plain meaning of the testator.

The LORD CHANCELLOR.

What construction do you put upon the words live and reside?

For the appellant.

The testator meant that *Juts* should be the principal residence of the parties entitled to his estates: it is difficult to say, that the true construction of the will is, that they were never to reside there at all: the evidence shews, that in 1782 *Pendock Neale* discontinued residing at *Juts*: from that time he held the estate for profit, not for residence.

The LORD CHANCELLOR.

Suppose he had been a member of parliament, and had had a house in *London*, would you have said that he did not live and reside at *Juts*? Assuming that there was a forfeiture by the father, there was the son to make the tenant to the precipe.

For the appellant.

It is in evidence that the father left *Juts*, for the purpose of residing elsewhere, before the birth of the son, and the forfeiture must be held to have taken place, on the

day of his leaving *Juts* for that purpose: the estate then went over to the person, who, at that time, was next in remainder, and the consequence is, that the recovery was bad, there not having been proper parties to it.

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The LORD CHANCELLOR then adverted to the estate of the trustees to preserve contingent remainders, but he subsequently observed, that, supposing such estate to have taken place, the father would have had only an equitable estate for life, and the son having the legal estate tail, they could not suffer a recovery.

For the appellant.

If the question admits of doubt, is the purchaser to be left to fight it with persons who may claim under the will?

Mr. *Hart*, Mr. *Wetherell*, Mr. *Shadwell*, and Mr. *Willis*, for the respondent.

A question of forfeiture is one *strictissimi juris*: it must be made out most clearly that there has been a breach of the directions contained in the will: there is no precise definition as to what is or is not residence: looking at the context of this will, the intention was merely to prevent the mansion-house being let; the devisee has fulfilled the condition by not letting the estate.

The LORD CHANCELLOR.

That will not do, because, if the devisee had let any part of the estate, there would have been no forfeiture; the lease would have been void after his death, but, by itself, the lease would not have worked a forfeiture.

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For the respondent.

The occupation of a house is sufficient to satisfy a condition to live and reside in it: supposing there was a forfeiture, the son took the benefit of it, and he afterwards joined in the recovery.

The LORD CHANCELLOR.

There is great difficulty in saying that a forfeiture was incurred, when the Court cannot see clearly what it was the testator meant. I cannot agree to the construction of this will which has been contended for, that the testator meant merely to prevent the letting of the estate; there are two things which he clearly meant to prevent, one the letting, the other the non-living and residing. Then comes the question what is living and residing: occupation is not living and residing: there are many purposes, for which the word inhabitant has been taken to include persons, as inhabitants of places in which they never were. The question comes to this, what it was the testator meant, and whether, unless a clear meaning can be put upon the will, the Court is to take upon itself to say that there has been a forfeiture.

March 11. The LORD CHANCELLOR said, that he was of opinion the title was good.

The decree was affirmed.

1823.

In the Matter of ELIZABETH WYKEHAM a Lunatic.

August 8.

UNDER the commission in this matter, which was issued on the 24th of *September* 1822, the said *Elizabeth Wykeham* was found to be of unsound mind, and to have been in the same state from the 1st of *August* 1819.

Where a lunatic had been taken out of the jurisdiction, before the commission issued, an order was made that she should be brought back to *England*.

A petition was now presented by the committee, stating, that in the month of *July* 1822, *John Heaver* and *Elizabeth* his wife, with whom the lunatic (who was the mother of *Elizabeth Heaver*) was then residing at *Brighton*, removed her from that place to *Calais*, for the purpose of avoiding any order that might be made in the matter, and of preventing the due execution of the commission; and that, upon the issuing of the commission, directions had been given for the lunatic's being brought back to *England*, but that, notwithstanding such directions, *Heaver* and wife detained the lunatic at *Calais*, under pretence that she could not be removed to *England* without endangering her life: the petition alleged, that this pretence was unfounded, and imputed improper motives to *Heaver* and wife in keeping the lunatic out of the jurisdiction, and it prayed, that directions might be given for her being brought back to *England*.

The allegations of the petition were supported by affidavits; and a counter affidavit was filed on the part of *Heaver* and wife, stating, that the incapacity of the lunatic arose from a paralytic affection, and that she retained her faculties, and was capable of understanding

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In the Matter of ELIZABETH WYKEHAM.

what passed; that she was residing at *Calais* according to her own wish and desire, and not under any coercion, and that she had every comfort and protection necessary to her infirmities; that she had expressed a disinclination to return to *England*, and that removing her from *Calais*, contrary to her wishes, might produce dangerous consequences.

Upon the hearing of the petition, the following order was made by the *Lord Chancellor*: — "I do think fit, and hereby order, that it be referred to the sitting Master during the vacation, to appoint a proper person, at the expense of the said *Elizabeth Wykeham*'s estate, to repair to the place where the said *Elizabeth Wykeham* now is; and in case such person shall be satisfied, upon such deliberate enquiry as he may think proper to make, that the said *Elizabeth Wykeham* may be brought to *England*, without danger or injury to her health, I do hereby further order, that the said *Elizabeth Wykeham* be delivered by *John Heaver* and *Elizabeth* his wife to the person so to be appointed, in order to her being brought to *England*, unless the said *John Heaver* and *Elizabeth* his wife do, upon the request of such person, forthwith bring the said *Elizabeth Wykeham* to *England*: and in case, after service of my order on *John Heaver* and *Elizabeth* his wife, the same shall not be complied with, I do hereby further order, that notice of such non-compliance be communicated to the said Master, by the person so to be appointed as aforesaid: and in case he shall be of opinion, that the said *Elizabeth Wykeham* cannot safely be brought to *England*, let due notice thereof be also communicated to the said Master."

The *Attorney-General* for the petition.

Mr. *Hart* against it.

AN

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TO THE

PRINCIPAL MATTERS.

ACCOUNT.

1. A creditor who makes out a *primâ facie* case of misconduct in trustees, is entitled to a decree that they shall account for whatever they might have received without their wilful default or neglect; though, in a prior suit instituted by another creditor and conducted without collusion, a common decree for an account has been previously made against them. *Shepherd* v. *Towgood.* Page 397

2. If an agent does not render his accounts within a reasonable time, he must bear the costs of a suit instituted to have the accounts taken; and it will not be any excuse for him, that he offered to pay on account a gross sum, which, it turns out, would have covered all that was due from him. *Collyer* v. *Dudley.* 421

3. Where a decree ordered, that, in taking the accounts of a mortgagee in possession, annual rests should be made, and that the rents and profits of the premises, as often as they exceeded the interest accrued due on the debt, should be applied in reduction of the principal; a rest ought to be made at the date of the receipt by the mortgagee of a sum exceeding the interest, though occurring in the interval between the annual rests. *Binnington* v. *Harwood.* Page 477

ACCUMULATION.

1. The plaintiff's father, upon the marriage of his daughters, demises an estate to trustees, upon trusts for raising certain sums, which are settled upon the daughters and their children; and by his will, after charging the estate with other sums to be settled upon the same trusts, with portions for sons, and with a further sum in discharge of a mortgage of another estate, devises it to other trustees, upon trust from time to time to

receive the rents and profits, and to invest the same in the purchase of stock, so as to accumulate and form a fund for the payment of the aforesaid charges; "and after the same should have been raised and paid, upon trust to pay the net rents, issues, and profits unto or for the benefit of such person of his own name, blood and family, as for the time being should succeed to and be invested with his title and dignity of a baronet, to the end that his said estate might be continued in his name, blood, and family, and be enjoyed and go along with his title, so long as the rules of law and equity would permit; but if upon failure of issue male of his body there should not be any person who should be entitled to enjoy his title, upon trust to stand seised of the estate, for the benefit of the person or persons who should be his right heir or heirs at law, and to convey and assure the same accordingly;" Held, that the trust for accumulation was good, and that the plaintiff, the succeeding baronet, took a vested estate for life. *Bacon* v. *Proctor*. Page 31

2. A testator gives a sum of stock to trustees, which they are to stand possessed of upon trust for *D. G.* until he shall attain the age of twenty-five years, and are to transfer to him when they in their discretion shall think proper; he likewise directs, that, if *D. G.* dies without lawful issue before receiving the bequest, the stock shall sink into the residue of his the testator's estate; and he bequeaths the residue to *W. F.*: while *D. G.* is under twenty-five years of age, and has not had the stock transferred to him, neither he nor *W. F.* is entitled to receive the accruing dividends; but these dividends must accumulate, to accompany the capital in its final destination. *Gordon* v. *Rutherford*. Page 373

ACQUIESCENCE.

Injunction to restrain the breach of a covenant, that buildings shall be erected upon a general plan, refused: the covenantee having acquiesced in a partial deviation from the plan, and not having made immediate application to the Court.

A landlord who relaxes, in favour of some of his tenants, a covenant entered into for the benefit of all, is not entitled to an injunction to restrain the other tenants from infringing that covenant. *Roper* v. *Williams*. 18

ADMINISTRATOR.

A writ *ne exeat regno* against a feme covert administratrix cannot be sustained. *Pannell* v. *Tayler*. 96

AGENT.

A solicitor cannot obtain the taxation of his agent's bill without

bringing the amount into Court. *Ostle* v. *Christian.* Page 324

See ACCOUNT, 2.

AGREEMENT.

See FRAUDS (Statute of) 1.

ALIMONY.

See NE EXEAT REGNO, 2.

AMENDMENT.

Where a bill is amended after answer, but no subpœna is served to answer the amended bill, the amendments go for nothing. *Cooke* v. *Davies.* 310

See DISMISSAL OF BILLS.
PLEA.

ANSWER.

1. If a bill and cross bill be filed, the plaintiff in the original bill has a right to the first answer, and may move to stay proceedings in the cross cause till the original bill is answered, though the plaintiff in the cross bill may be in a situation to enforce an answer first.

The right of the plaintiff in the original bill to make the motion, was held not to have been waived, by his having taken out the common orders for time to answer the cross bill. *Harris* v. *Harris.* 165

2. A defendant who has put in three insufficient answers, and is in custody for want of a fourth, is entitled to his discharge immediately on filing the fourth.

After a fourth answer reported insufficient, it is a motion of course, that the defendant shall be examined upon interrogatories and stand committed.

The interrogatories are to be settled by the Master, and must go directly to the points to which the exceptions are sustained.

The defendant, instead of putting in a written examination to the interrogatories, is to be examined personally upon them by the Master. *Farquharson* v. *Balfour.* Page 184

3. Exceptions to the Master's report of the insufficiency of a fourth answer, ordered to be heard immediately, upon the terms of the defendant's rendering himself amenable to process. 189

4. Sufficiency of a fourth answer to be decided upon, not by looking at the fourth answer only, but by looking at it, connected and taken with the three preceding answers. 189

5. Mode of conducting the personal examination of a defendant upon interrogatories after a fourth insufficient answer. 200

6. The defendant is not to be discharged out of custody, upon the the Master's report of the sufficiency of his examination, till the plaintiff has seen the examination. 202

7. The object of the Court, in directing the defendant to be examined upon interrogatories is, that, upon that examination, he

shall not be liberated out of custody, till he has given a sufficient answer, not only to the questions contained in the bill, to which he has not before answered, but to every question, which the Master thinks may fairly arise out of the matter which may be contained in the answers to those questions, without putting the plaintiff to the trouble of amending his bill. Page 202

8. The plaintiff has no right to notice of the defendant's examination.

9. *Semble*, The proper mode of discussing the insufficiency of the defendant's examination is, upon the old exceptions, with respect to any of the original interrogatories in the bill remaining unanswered, and upon new exceptions, with respect to any new questions which the Master may have introduced in settling the interrogatories. The insufficiency of the examination permitted to be shown as cause against the defendant's discharge. *Farquharson v. Balfour.* 203

10. After a demurrer overruled, an order for time to answer merely, can be obtained only by special application. *Trim* v. *Baker.* 253

11. Where a demurrer is overruled, the defendant, at the time of its being overruled, may move for time to answer. *Trim* v. *Baker.* 254

12. After a plea overruled, an order for time to answer, obtained as of course, is irregular. *Ferrand* v. *Pelham.* Page 404

APPEAL.

Where a limited tribunal takes upon itself to exercise a jurisdiction which does not belong to it, its decision amounts to nothing; and does not create any necessity for an appeal. *Attorney-General* v. *Lord Hotham.* 219

APPOINTMENT.

See POWER.

ARMY (COMMISSION IN).

1. An officer in the army cannot pledge or mortgage his commission. *Collyer* v. *Fallon.* 459

2. An officer deposited his commission as a security for a loan of money, and further covenanted with the depositary *B.* to sell the commission, and to repay the loan out of the proceeds of the sale; a sale having been effected subsequently, and the regulation price having been paid to the retiring officer's agents, he transmitted to them a written order, directing them to discharge, out of the money in their hands, certain specified debts due from him to certain specified individuals, which individuals had no notice of his contract with *B.*: Held, that these creditors were entitled to a priority over *B.* *Ibid.*

3. After the institution of the suit, the officer took the benefit of the insolvent debtors' act: Held, that *B.* had not any title, preferable to

that of the general body of the insolvent's creditors, to the surplus which remained after the debts specified in the written order were satisfied. Page 459

ATTORNEY.

See PRACTICE, 2. 5. 17. 24.

AWARD.

1. The jurisdiction to give effect to an award, confirmed by the decree of the Court in the case of a charity, is doubtful: but the renewal of a lease upon the terms of the award, having been twice directed by the Court, was again enforced. *Attorney-General* v. *Clements*. 158

2. Where accounts between trustee and *cestuisque trust* are referred to arbitration, and the award is made a rule of a court of law under the stat. 9 & 10 *W*. 3., though there be fraudulent misrepresentation by the trustee to the arbitrators as to particular items of the account, a bill cannot be maintained by the *cestuisque trust* after the time limited by the statute has elapsed, to set aside the award as to the items impeached, leaving it to stand as to the remaining items, the award upon the face of it being entire. *Auriol* v. *Smith*. 121

3. Where there is a palpable objection upon the face of an award, the Court may refuse to enforce it, but cannot set it aside, after the time limited by the statute has elapsed. *Auriol* v. *Smith*. 125

4. *Semble*, The jurisdiction in matters of award, referred under the statute 9 & 10 *W*. 3., is altogether transferred to the Court of which the submission is made a rule: and awards of that nature must be regulated by the statute with respect to the period within which application must be made to set them aside. A case of fraud does not constitute an exception. *Auriol* v. *Smith*. Page 126

5. Where a party applies to set aside an award on the ground of newly discovered fraud, he is bound to shew that it is a new discovery, and that he could not with due diligence have made the discovery before. 127

6. An award may be good in part, and bad in part, where the subject is clearly capable of being separated: but not where all the matters are within the submission, and the award is upon the face of it entire. 128

BARON AND FEME.

1. Feme sole makes a mortgage of a leasehold for years, and afterwards marries; the mortgage is then transferred, and the husband joins in the transfer, and covenants to pay the money. During the coverture, the husband by gradual payments out of his own property reduces the money due upon the mortgage; by his

will he makes a disposition of the mortgaged premises, and dies in the lifetime of his wife, upon a bill by the wife, who claimed to be entitled by survivorship, to redeem the mortgage, the redemption was decreed upon the terms, that the husband's estate should stand in the place of the mortgagee, for the sums paid by him out of his own property, in reduction of the mortgage debt. *Pitt* v. *Pitt* . . . . . Page 180

2. A legacy given to a married woman "for her own use and at her own disposal" vests in her as separate estate. *Prichard* v. *Ames* 222

3. The Court refused to take the consent of a married woman to give up her reversionary interest, in part vested and in part contingent, in a fund in Court, in favour of a purchaser from her husband. *Wade* v. *Saunders* 306

BOND.

1. Where two persons execute a bond, the one as principal the other as surety, and no other assurance is executed at the time, the surety paying the bond debt is only a simple contract creditor of the principal debtor. *Copis* v. *Middleton* 224

2. Where a bond is given by principal and surety, and at the same time a mortgage is made for securing the debt, the surety, if he pays the bond, has a right to stand in the place of the mortgagee. 231

3. *A.* and *B.* entered into a joint and several bond for securing a sum of money advanced to *A.* by his bankers. After the execution of the bond, and before it became due, *A.* paid money to the bankers, and he continued to draw upon them until his banking account was overdrawn. Some years afterwards an account was settled between *A.* and the bankers in which the whole money secured by the bond was treated as remaining due from *A.* The bankers then took a warrant of attorney from *A.* for securing payment of the balance found due upon the settlement, by instalments at distant periods. Several of the instalments were paid, but *A.* became bankrupt before the whole debt was liquidated. It being proved that *B.* was privy to the settlement of accounts between *A.* and the bankers, and to the arrangement respecting the warrant of attorney: Held, first that *B.* was not discharged by the time given to *A.*, and secondly, that the bond was not discharged by the course of payment, the money paid by *A.* to the bankers being applicable to the banking account, and the bankers being entitled to hold the bond and warrant of attorney as distinct securities.

Upon the occasion of the bond being executed, the title deeds of an estate purchased by *A.* were deposited with *B.* as an indemnity against his liability upon the bond;

the legal interest in the estate was likewise conveyed to *B.*, and it was agreed that he should also hold it as an indemnity. After the death of *B.* his executor delivered up the title deeds to *A.*, upon a false representation by him that the bond had been paid off. Held, that a conveyance of the legal estate could not be compelled until the indemnity was worked out, and that the lien upon the title deeds remained. *Tyson* v. *Cox.* Page 395

BUILDING PLAN.

See INJUNCTION, 1, 2.

CHARITY.

1. The jurisdiction to give effect to an award, confirmed by the decree of the Court in the case of a charity, is doubtful: but the renewal of a lease, upon the terms of the award, having been twice directed by the Court, was again enforced. *Attorney-General* v. *Clements.* 58
2. Upon an information to set aside a lease for ninety-nine years of charity lands, the defendants the lessees set up a title adverse to the lease: upon the merits it was held, that there was no ground for the defence; but the Court was of opinion, that if the merits had been otherwise, the defendants were estopped, and could not dispute the title while they retained the possession.

Semble, The lessees ought not to have been permitted to enter into evidence upon the principle that the plea of *puis darrein continuance* could not have been pleaded at law. A mere husbandry lease of charity lands for ninety-nine years at an uniform rent cannot be supported. *Attorney-General* v. *Lord Hotham.* Page 209
3. Testator, after bequeathing to *A.* and *B.* legacies of stock unequal in amount, and giving several legacies to public charities, requests the said *A.* and *B.* to be his executors, and gives to them as such 100 guineas each. He then orders his books, jewels, plate, and furniture to be sold, and after desiring mourning to be provided for his servants, and five guineas each to be given to several persons named in the will and to his two executors for a ring as a token of remembrance, concludes his will in the following manner: "In case there is any money remaining, I should wish it to be given in private charity." Held, That private charity was an object too indefinite to give the Crown jurisdiction, or to enable the Court to execute the trust. *Commaney* v. *Butcher* 860
4. Where there is a general indefinite charitable purpose not fixing itself upon any particular object, the disposition is in the king

by the sign manual, but when the gift is to trustees, with general or some objects pointed out, the Court will take upon itself the execution of the trust. Page 270

5. If a particular object, as the erection of a school, or even a general object, provided it can be seen what the purpose is, is pointed out, the Court will execute the trust, although the object pointed out may fail.

Cases in which the Court has interfered upon the ground of trust, distinguished from those in which a direct charity has been pointed out. 271

6. Where, in a charity-information, the relators are allowed their costs of proceedings which the Attorney-General has attended separately by his own solicitor, without an order of the Court for so doing, the Attorney-General will not be allowed his separate costs. *Attorney-General* v. *Dove*. 328

7. A testator, after giving a legacy in trust for a charitable purpose, says, "As money is of more uncertain value than land, I do also give them (the trustees) power to make such purchase as they shall think best for perpetuating the gift:" — Held, that these words do not bring the legacy within the mortmain act.

A testatrix gives a legacy in trust for the minister of a chapel, but directs that, upon a specified contingency, the legacy is to go to the trustees of a certain college; the interest is paid during many years to the minister of the chapel: Held, that the charity for the chapel may be established upon a bill and information to which the trustees of the college are not parties. *Attorney-General* v. *Goddard*. Page 348

CHILDREN.

Illegitimate children not entitled under the description of children, the intention not being sufficiently apparent upon the face of the will.

Legacy in trust for the children of *A.*, to be equally divided between them with benefit of survivorship, and a provision for maintenance out of the interest, *A.* having no children at the death of the testator: Held, that after-born children would take, and that the interest till the birth of a child fell into the residue. *Harris* v. *Lloyd*. 310

COLLIERY.

See PRACTICE, 3.

CONSENT.

See BARON AND FEME, 3.

CONTEMPT.

The ordinary rule of the Court in cases of contempt is, that there shall be a personal examination of the party.

The defendant may be attended by Counsel upon his examination

before the Master. *Farquharson* v. *Balfour.* Page 197

See ANSWER, 2—9.

CONTRIBUTION.

Where sureties are bound by different instruments for equal portions of a debt due from the same principal, and the suretyship of each is a separate and distinct transaction, there is no right of contribution between them. *Coope* v. *Twynam.* 426

CONVERSION.

The creditors of a vendor cannot insist that an estate contracted to be sold has been converted into personal assets, unless the title be such, that the Court will compel a purchaser to take it. *Johnson* v. *Legard.* 281

CO-PLAINTIFFS.

See PLEADING, 2, 3.

COSTS.

1. Solicitor's lien is superseded by taking a security. *Balch* v. *Symes.* 92

2. A solicitor's bill having been partly taxed, and paid, an order, obtained as of course, referring the bill generally for taxation, was discharged with costs.

Where a party has a pressing necessity for papers in the hands of his solicitor, the Court will order them to be delivered up upon a deposit being made sufficient to cover the amount of the solicitor's bill and the costs of the taxation.

Semble, An order directing the costs of the suit to be taxed warrants a taxation up to the time of the Master's making his report.

The conduct of the solicitor cannot be adduced in support of such an order, and the costs of affidavits upon that subject were ordered to be paid as between solicitor and client. *Clutton* v. *Pardon.* Page 301—4

3. The costs of the Committee of a lunatic trustee, conveying under the statute, must be paid by the *cestuique trust.*

The estate being vested in the lunatic upon trusts for securing an annuity, and subject thereto upon trust for the grantor of the annuity, the grantee and the assignees of the grantor of the annuity were ordered to defray equally the Committee's costs of an application by them for a reconveyance of the estate. *Ex parte Pearse.* 325

4. Where, in a charity-information, the relators are allowed their costs of proceedings which the Attorney-General has attended separately by his own solicitor, without an order of the Court for so doing, the Attorney-General will not be allowed his separate costs. *Attorney-General* v. *Dove.* 328

5. A party, who is served with a petition, but who has no interest in the order to be made upon it, is not entitled to the costs of appearing on the hearing of that petition. *Garey* v. *Whittingham.* 405

6. A bill of costs, where the amount

of it has been settled between the solicitor and client, and part of it has been paid and security given for the remainder, will not be ordered to be taxed, merely because it contains charges which would be disallowed on taxation.

Semble, An order obtained as of course, or the taxation of a bill of costs, which has been settled and paid, will not be discharged for mere irregularity, without any discussion of the merits, if the petition, seeking to discharge that order, enters into the merits of the case. *Gretton* v. *Leyburne.* Page 407

7. If an agent does not render his accounts within a reasonable time, he must bear the costs of a suit instituted to have the accounts taken; and it will not be any excuse for him, that he offered to pay on account a gross sum, which, it turns out, would have covered all that was due from him. *Collyer* v. *Dudley.* 421

An equity of redemption, being subject to a trust for sale, the mortgagee, with some of the *cestuisque trusts* of the equity of redemption, filed a bill for the sale of the premises, alleging that the whole of his principal, with an arrear of interest, was due to him, and suppressing the fact, that he had been for several years in possession; the result of the account was, that nothing was due on the mortgage when the bill was filed: Held, that the mortgagee must pay to the defendants the costs of so much of the suit as related to the mortgage, and the accounts and enquiries concerning it. *Binnington* v. *Harwood.* Page 477

COUNSEL.

See ANSWER, 2.
CONTEMPT.

COURT ROLLS.

See EVIDENCE, 4.

COVENANT.

1. The representative of a deceased partner, the account between him and the partnership being at the time unsettled, agrees with the surviving partners to assign to them all his interest in the concern, upon being paid a certain sum of money, and having an indemnity against all claims upon the partnership; the assignment is executed, the money paid, and a joint covenant of indemnity given by the surviving partners: Held, that the covenant is not to be considered in equity as a joint and several covenant. *Sumner* v. *Powell.* 423

2. Tenant of a lunatic's estate relieved against an ejectment founded on a forfeiture by breach of covenant to repair. *Ex parte Vaughan.* 434

See INJUNCTION, 1.

CROSS BILL.

See ANSWER, 1.

DEBTOR AND CREDITOR.

Where real estates are devised in trust for the payment of debts, in aid of the personal estate, the statute of limitations does not run in equity after the death of the testator. *Hughes* v. *Wynne*. Page 307

See ACCOUNT, 1.
CONVERSION, 1.
SPECIFIC PERFORMANCE, 1.

DECREE.

1. Where the enrolment of a decree is gained by surprise, the Court will vacate it. *Stevens* v. *Guppy*. 178

2. A creditor, who makes out a *primâ facie* case of misconduct in trustees, is entitled to a decree that they shall account for whatever they might have received without their wilful default or neglect; though, in a prior suit instituted by another creditor, and conducted without collusion, a common decree for an account has been previously made against them. *Shepherd* v. *Towgood*. 397

DEED.

1. Bill to rectify a conveyance, alleged to have passed by mistake more than was included in a previous agreement, dismissed; the conveyance reciting a more extended agreement, the parties being dead, the agent of the grantor having acknowledged the extended agreement, and the agent of the grantee, who could have given a personal account of the transaction, not having been examined by the plaintiff.

A conveyance which passes too much may be rectified, and the excess deducted.

Semble, An issue may be directed with a view to correcting a mistake in a deed. *Beaumont* v. *Bramley*. Page 41

2. Where a deed affects by its recital to carry an agreement into execution, and goes beyond the agreement, the Court will rectify. 52

3. Reason for using caution in cutting down the effect of a conveyance. 54

See LIEN, 2.
SURETY, 4.

DEMURRER.

1. An estate being in lease, *A.* enters and receives the rents during the continuance of the lease, and afterwards continues in possession, up to a period more than twenty years distant from the time of his entry. Within twenty years after the expiration of the lease, *B.* brings an ejectment, and files a bill for discovery; though the ejectment might be maintained at law, a demurrer to the discovery is good. *Cholmondeley* v. *Clinton*. 107

2. Where a bill is filed to stay waste, and a demurrer is put in, the Court will hear the demurrer immediately. *Coxe* v. *Harris*. 514

See ANSWER, 10, 11.

DESCENDANTS.

The word "descendants" is capable of such a construction as to show who fall within the class which that word describes. *Wright* v. *Atkyns.* Page 162

DISCOVERY.

See DEMURRER, 1.

DISMISSAL OF BILL.

1. Where a plaintiff amended his bill after answer, but did not serve a subpœna to answer the amendment, or file a replication to the answer, an order obtained as of course to dismiss the bill for want of prosecution, after three terms from the filing of the answer, but within three terms from the date of the amendments, was held to be regular, though the defendant had obtained an order that the plaintiff should amend his bill within a limited time, and the plaintiff had amended accordingly, and had also amended the defendant's office copy of the bill. *Cooke* v. *Davies.* 309

2. Where a cause was not proceeded in for three clear terms after answer, the common order to dismiss the bill for want of prosecution, obtained by the defendant in the vacation after the third term, was held to be regular. *Farquharson* v. *Seton.* 378

ENROLMENT.

See DECREE, 1.

ESTATE.

1. Equitable tenant in tail aliens in fee by way of mortgage; a good equitable recovery may be suffered of the secondary equitable estate, without the concurrence of the mortgagee. *Nouaille* v. *Greenwood.* Page 26

2. The plaintiff's father, upon the marriage of his daughters, demises an estate to trustees, upon trusts for raising certain sums, which are settled upon the daughters and their children; and by his will, after charging the estate with other sums to be settled upon the same trusts, with portions for sons, and with a further sum in discharge of a mortgage of another estate, devises it to other trustees, upon trust from time to time to receive the rents and profits, and to invest the same in the purchase of stock, so as to accumulate and form a fund for the payment of the aforesaid charges; "and after the same should have been raised and paid, upon trust to pay the net rents, issues, and profits, unto or for the benefit of such person of his own name, blood, and family, as for the time being should succeed to and be invested with his title and dignity of a baronet, to the end that his said estate might be continued in his name, blood, and family, and be enjoyed and go along with his title, so long as the rules of law and equity would per-

mit; but if, upon failure of issue male of his body, there should not be any person who should be entitled to enjoy his title, upon trust to stand seised of the estate, for the benefit of the person or persons who should be his right heir or heirs at law, and to convey and assure the same accordingly:" Held, that the trust for accumulation was good, and that the plaintiff, the succeeding baronet, took a vested estate for life. *Bacon* v. *Proctor.* Page 31

3. Devise to *A.* and her heirs for ever, in the fullest confidence that after her decease she will devise the property to my family; *A.* is tenant in fee. *Wright* v. *Atkyns.* 143

Under an immediate devise to *A.* for life, remainder to "my family," the heir at law of the testator is entitled in remainder. 156

4. An infant tenant in tail is bound to keep down the interest of debts charged upon the entailed estates.

A tenant for life was also held to have been liable to keep down the interest of the debts, although, having the ultimate remainder in fee, he had consented to an act of parliament, by which the estates were vested in trustees for the payment of the debts. *Burges* v. *Mawbey.* 167

Tenant for life is bound to keep down the interest of debts, but being an heir at law not otherwise provided for, is, as against the remainder-man, entitled to maintenance. *Burges* v. *Mawbey.* Page 174

EVIDENCE.

1. Upon the hearing of an interpleading bill, evidence is admissible to shew that the plaintiff has retained possession of the subject of the suit under an indemnity from some of the defendants. *Statham* v. *Hall.* 30

2. Executor, taking a contingent reversionary interest under the will, not precluded from giving evidence of the intention that he should have the residue beneficially, nothing upon the face of the will indicating that he was to take the office merely.

Claiming the residue as executor, is sufficient to let in parol evidence in support of the legal title, without alleging a title by the effect of the parol evidence. *Lynn* v. *Beaver.* 66

3. Upon an information to set aside a lease of charity lands, the lessees ought not to be permitted to enter into evidence of a title adverse to the lease, upon the principle that the plea of *nil habuit in tenementis* could not be pleaded by them at law. *Attorney-General* v. *Lord Hotham.* 209

4. The court-rolls of a manor, taken by themselves, are evidence only against the tenants of the manor, and the lord of the manor. *Attorney-General* v. *Lord Hotham.* 217

5. Where a sum of money came to the hands of one of two executors, who paid it over to the other executor, it was held that the executor who first received it could not, under the usual decree for an account, examine the other executor as a witness to prove that the money paid over was duly applied on account of the affairs of the testator, and an order obtained for that purpose was discharged. *Dines* v. *Scott.* Page 358

6. A person, who admits that he conceives himself bound in honour, though not legally bound, to contribute to the expenses of a party in a suit, is a competent witness for that party. *Parker* v. *Whitby.* 366

7. Proof of the hand-writing of an attesting witness to a will, received under particular circumstances, in order to found a decree establishing the will. *James* v. *Parnell.* 417

EXAMINATION.

1. Personal examination in equity is not analogous to the *vivâ voce* examination of a witness. *Farquharson* v. *Balfour.* 198

2. An examination may be quite sufficient, though it is untrue and inconsistent with what has been sworn by the defendant in his answers.

The principle of this Court is, that the plaintiff must be satisfied with what the conscience of the defendant allows him to swear. *Farquharson* v. *Balfour.* 204

EXECUTOR.

1. Executor taking a contingent reversionary interest under a will, not precluded from giving evidence of the intention that he should have the residue beneficially, nothing upon the face of the will indicating that he was to take the office merely.

Under the effect of the will and the evidence the executor was declared to be entitled beneficially.

Whether the contingent reversionary interest would have had the effect of rendering him a trustee for the next of kin ? — *Quære.* *Lynn* v. *Beaver.* Page 63

The motives which might influence the testator in favour of the executor are to be considered in determining the question, whether the executor takes the residue beneficially. 68

2. Executors may pay legacies, or hand over the residue, within the year after the death of the testator. *Augustin* v. *Martin.* 241

3. The custom of *York* does not apply where an executor is appointed. *Wilkinson* v. *Atkinson.* 257

4. Where a sum of money came to the hands of one of two executors, who paid it over to the other executor, it was held that the executor who first received it could not, under the usual decree for an account, examine the other executor as a witness to prove that the money paid over was duly applied on account of the affairs of the

testator, and an order obtained for that purpose was discharged. *Dines* v. *Scott.* Page 358

5. A person, who is permitted by an executor to possess himself of part of the assets of a testator, and who, after the executor's death, and when there is no legal personal representative either of the testator or of the executor, retains the assets, and acts in the execution of the trusts of the will, is not *executor de son tort* to the original testator. *Tomlin* v. *Beck.* 438

FAMILY ARRANGEMENT.

A father being tenant for life, with remainder to his first and other sons successively in tail male, the eldest son, soon after he attained twenty-one, joined his father in suffering a recovery; an annuity was secured to him during his father's life; parts of the estates were limited to the father in fee, and the residue of them were resettled, the son taking back an estate for life, with remainder to his first and other sons in tail general, remainder to his daughters in tail general. The transaction is to be considered as a mixed case of bargain and sale, and of family arrangement; and the eldest son having died without issue, a bill filed by his brother, the next remainder-man in tail, who had done confirmatory acts, and accepted interests under the will of his father, to set aside the settlement as obtained by undue influence, was dismissed.

Transactions of this nature between father and child, to be viewed with a reasonable degree of jealousy, not in the light of reversionary bargains.

Whether, after the lapse of twenty years, such a suit could be maintained at all?—*Quære.*

Whether a remote remainder-man can complain of a transaction between the tenant for life and the immediate remainder-man, where the immediate remainder-man makes no complaint?—*Quære.* *Tweddell* v. *Tweddell.* Page 1

FEME COVERT.

1. A writ of *ne exeat regno* against a feme covert administratrix cannot be sustained. *Pannell* v. *Tayler.* 96

2. Feme covert holding herself out in the character of a feme sole may be arrested, and courts of law will not discharge her upon motion. *Pannell* v. *Tayler.* 100

FOREIGN GOVERNMENT.

Whether the King's Courts will interfere upon the subject of a contract with a country which he does not recognize, or will assist in the recovery of money advanced by the subjects of this country to a colony at war with its parent state, the parent state being at peace with this country? *Jones* v. *Garcia del Rio.* 299

FORFEITURE.

See COVENANT, 2.
SPECIFIC PERFORMANCE, 7.

FRAUD.

Where a party applies to set aside an award on the ground of newly discovered fraud, he is bound to shew that it is a new discovery, and that he could not with due diligence have made the discovery before. *Auriol* v. *Smith*. Page 127

FRAUDS (STATUTE OF).

The person entitled to the reversion in fee of a house, expectant upon a term vested in a lessee who has demised the premises for a portion of his term to a sub-lessee, agrees by one letter to grant that sub-lessee *an extension of lease* at a certain yearly rent, and, in another letter, fixes the time, when the term, which he thus proposes to grant, is to expire; this is a valid agreement within the statute of frauds, and, under it, the sub-lessee has a right to a lease which shall commence from the expiration of the existing term. *Verlander* v. *Codd*. 352

HEIR.

See ESTATE, 4.

IMPERTINENCE.

1. Upon a bill filed by merchants in *England* against merchants in *India*, for an account of the dealings and transactions between them, one of the defendants, residing in *England*, in answer to an allegation in the bill that some cotton which had been sent by the defendants to the plaintiffs was of inferior quality, said, that he had no personal knowledge of the dealings between the two firms, but that he had received certain affidavits and certificates, which his partners in *India* had caused to be made by experienced persons there, from which he believed the cotton to be of superior quality, and set forth the affidavits and certificates, in a schedule, *in hæc verba*: held that the schedule was not impertinent. *Parker* v. *Fairlie*. Page 368

2. A few unnecessary words in a bill do not render it impertinent.

In a bill for an account, it is not impertinent to set out at length letters sent to the defendant demanding the account, though the bill contains a general allegation that applications have been made to the defendant to account, and the usual charge as to letters in the possession of the defendant. *Del Pont* v. *De Tastet*. 486

INCUMBRANCES.

In all cases where money is paid off by individuals, not having an absolute permanent interest in the premises, the Court looks at the intention. *Pitt* v. *Pitt*. 183

See INTEREST, 1.

INJUNCTION.

1. Injunction to restrain the breach of a covenant, that buildings shall be erected upon a general plan, refused: the covenantee having acquiesced in a partial deviation from the plan, and not having made immediate application to the Court.

A landlord who relaxes, in favour of some of his tenants, a covenant entered into for the benefit of all, is not entitled to an injunction to restrain the other tenants from infringing that covenant. *Roper* v. *Williams*. Page 18

2. Where a decision which is to bind others, can only be made hereafter, it is the duty of the Court, in the mean time to preserve the property in such a state, that, when it is made out who are the objects of favourable decision, they may have the benefit of it.

The Court therefore refused to interfere by injunction to restrain *A.*, who claimed to be devisee in fee, from cutting down timber, upon a bill filed by persons claiming to be interested under the same devise as remainder-men after the death of *A.*, but ordered that *A.* should be at liberty to cut the timber, in a husbandlike manner, as tenant in fee, giving security for the value, or bringing the value into Court. *Wright* v. *Atkyns*. 143

3. Motion to stay the execution of a writ of inquiry of damages, not supported by the ordinary affidavit upon a motion to stay trial, refused with costs. *Rodenhurst* v. *Tudman*. Page 305

4. Injunction granted to stay proceedings upon a sentence in the Admiralty Court, new evidence having been discovered at a period when, according to the practice of that Court, it could not be received. *Jarvis* v. *Chandler*. 319

5. Tenant of a lunatic's estate relieved against an ejectment founded on a forfeiture by breach of covenant to repair. *Ex parte Vaughan*. 434

6. Where there is a case for a special injunction, and the injunction will operate for the benefit of parties not before the Court, the absence of those parties, though made the ground of demurrer to the bill, will not prevent the Court interposing. *Const* v. *Harris*. 512

INTEREST.

1. An infant tenant in tail is bound to keep down the interest of debts charged upon the entailed estates.

A tenant for life was also held to have been liable to keep down the interest of the debts, although, having the ultimate remainder in fee, he had consented to an act of parliament, by which the estates were vested in trustees for the payment of the debts. *Barges* v. *Mawbey*. 167

2. The interest of a legacy not expressly disposed of by a will till the persons come into existence who are to take the capital, falls into the residue. *Harris* v. *Lloyd*. 314

INTERPLEADING.

Upon the hearing of an interpleading bill, evidence is admissible to shew that the plaintiff has retained possession of the subject of the suit under an indemnity from some of the defendants. *Statham* v. *Hall.* Page 30

INTERROGATORIES.

See ANSWER, 2.

ISSUE.

1. An issue may be directed with a view to correcting a mistake in a deed. *Beaumont* v. *Bramley.* 41
2. Miscarriage of a Judge in directing a jury is not a ground for a new trial, if looking at the whole evidence and the address of the Judge to the jury the conscience of the Court is satisfied. *Head* v. *Head.* 142

JURISDICTION.

1. Where a limited tribunal takes upon itself to exercise a jurisdiction which does not belong to it, its decision amounts to nothing; and does not create any necessity for an appeal. *Attorney-General* v. *Lord Hotham.* 219
2. Whether the King's Courts will interfere upon the subject of a contract with a country which he does not recognize, or will assist in the recovery of money advanced by the subjects of this country to a colony at war with its parent state, the parent state being at peace with this country? *Jones* v. *Garcia del Rio.* Page 299

See CHARITY, 3.
TRUST, 4.

KING.

See CHARITY, 3.

LAND-TAX.

Where lands are allotted under an inclosure act in respect of rights of common appurtenant to other lands of which the land-tax has been redeemed, the land-tax does not attach upon the allotment. *Boehm* v. *Wood.* 334

LANDLORD AND TENANT.

1. Injunction to restrain the breach of a covenant, that buildings shall be erected upon a general plan, refused; the covenantee having acquiesced in a partial deviation from the plan, and not having made immediate application to the Court.

   A landlord who relaxes in favour of some of his tenants, a covenant entered into for the benefit of all, is not entitled to an injunction to restrain the other tenants from infringing that covenant. *Roper* v. *Williams.* 18
2. The Court will not direct a reference to the Master as to the reduction of rent upon the petition of a tenant. *Ex parte Town.* 187

LAPSE.

Where a testator, resident and domiciled at the time of his death

within the province of *York*, disposes of all the residue of his personal estate, and names executors, but his disposition fails as to part of the residue, by the death of one of the residuary legatees in his lifetime, the share which thus becomes lapsed, will be apportioned between the widow and the next of kin, according to the statute of distributions, and will not be affected by the custom of the province. *Wilkinson* v. *Atkinson*. Page 275

LEASE.

Upon an information to set aside a lease for ninety-nine years of charity lands, the defendants the lessees set up a title adverse to the lease: upon the merits it was held, that there was no ground for the defence; but the Court was of opinion, that if the merits had been otherwise, the defendants were estopped, and could not dispute the title, while they retained the possession.

Semble, The lessees ought not to have been permitted to enter into evidence, upon the principle that the plea of *nil habuit in tenementis* could not have been pleaded at law.

A mere husbandry lease of charity lands for ninety-nine years at an uniform rent cannot be supported. *Attorney-General* v. *Lord Hotham*. 209

LEGACY DUTY.

A testator directs his executors and trustees to pay certain annuities and legacies, "clear of the property-tax, and all expenses attending the same;" the legacy duty ought to be paid by the executors out of the assets of the testator, and the annuitants and legatees are entitled to receive the full amount of their respective legacies and annuities, without any deduction in respect of legacy duty. *Courtoy* v. *Vincent*. Page 433

LEGITIMACY.

Where personal access between husband and wife is established, sexual intercourse is to be presumed; and the presumption must stand, till rebutted by clear and satisfactory evidence. *Head* v. *Head*. 138

See CHILDREN, 1.

LIEN.

1. A solicitor has no lien upon the will of his client, and cannot refuse to produce a deed executed by the client in his favour, containing a reservation of a life interest, and a power of revocation.

Where a deed is sought to be impeached, the plaintiff is entitled to have it produced, and the defendant cannot resist the production upon the ground of lien.

In a suit instituted against a solicitor, who had also acted in the capacity of steward, for an account and for delivery of title-deeds, the Court upon motion ordered the deeds to be delivered

up to the plaintiff, upon payment into court of so much of the balance claimed by the answer as was not covered by any security. *Balch* v. *Symes.* Page 87

2. Where deeds are deposited for the purpose of obtaining credit, the person with whom they are deposited has no lien upon them for what is due to him in respect of monies previously advanced. *Mountford* v. *Scott.* 274

3. Where a party has a pressing necessity for papers in the hands of his solicitor, the Court will order them to be delivered up upon a deposit being made sufficient to cover the amount of the solicitor's bill and the costs of the taxation. *Clutton* v. *Pardon.* 301

4. A solicitor, who has declined to proceed with a cause, will be ordered, though his bill of costs are not paid, to deliver up the papers to the present solicitor of the party, the latter undertaking to hold them subject to the former solicitor's lien, for what shall be found due to him on the taxation of the bills.

An offer on the part of the former solicitor, after the motion is made, to proceed with the cause, will not prevent the Court from ordering him to deliver up the papers on the terms mentioned above. *Colegrave* v. *Manby.* 400

LIMITATIONS (STATUTE OF).

Where real estates are devised in trust for the payment of debts, in aid of the personal estate, the statutes of limitations does not run run in equity after the death of the testator. *Hughes* v. *Wynne.* Page 307

LUNACY.

1. The costs of the committee of a lunatic trustee, conveying under the statute, must be paid by the *cestuique trust.*

The estate being vested in the lunatic upon trusts for securing an annuity, and subject thereto upon trust for the grantor of the annuity, the grantee and the assignees of the grantor of the annuity were ordered to defray equally the committee's costs of an application by them for a reconveyance of the estate. *Ex parte Pearse.* 325

2. Tenant of a lunatic's estate relieved against an ejectment founded on a forfeiture by breach of covenant to repair. *Ex parte Vaughan.* 434

3. Where a lunatic had been taken out of the jurisdiction before the commission issued, an order was made that she should be brought back to *England.* *In the matter of Elizabeth Wykeham.* 537

MAINTENANCE.

Tenant for life is bound to keep down the interest of debts, but, being an heir at law not otherwise provided for, is, as against the remainder-man, entitled to maintenance. *Burgess* v. *Mawbey.* 174

MISNOMER.

Semble, Where the plaintiff is misnamed in an order to dismiss a bill for want of prosecution, in consequence of an error in the six clerks' certificate, a replication filed after service of the order will not be irregular. *Verlander* v. *Codd.* Page 94

MISTAKE.

Bill to rectify a conveyance alleged to have passed by mistake more than was included in a previous agreement, dismissed; the conveyance reciting a more extended agreement, the parties being dead, the agent of the grantor having acknowledged the extended agreement, and the agent of the grantee, who could have given a personal account of the transaction, not having been examined by the plaintiff.

A conveyance which passes too much may be rectified, and the excess deducted.

Semble, An issue may be directed with a view to correcting a mistake in a deed. *Beaumont* v. *Bramley.* 41

MONEY.

Testatrix, by her will, disposes of certain long annuities, and of a sum in cash, and then uses the following words; "I believe there will be sufficient money left to pay my funeral expenses." By a codicil to her will the testatrix expresses herself thus: "If there is money left unemployed, I desire it may be given in charity." Held, that the general residue of the testatrix's personal estate, including a sum of 2500*l.* trust monies, in which she had a vested reversionary interest, at the time of her death, subject to be devested by the appointment of her mother, passed under the words "money left unemployed," and was well given to charity. *Omnanney* v. *Butcher.* Page 265, 266

See WILL, 8.

MORTGAGE.

1. Feme sole makes a mortgage of a leasehold for years, and afterwards marries; the mortgage is then transferred and the husband joins in the transfer, and covenants to pay the money. During the coverture, the husband by gradual payments out of his own property reduces the money due upon the mortgage; by his will he makes a disposition of the mortgaged premises, and dies in the lifetime of his wife; upon a bill by the wife, who claimed to be entitled by survivorship, to redeem the mortgage, the redemption was decreed upon the terms, that the husband's estate should stand in the place of the mortgagee, for the sums paid by him out of his own property, in reduction of the mortgage debt. *Pitt* v. *Pitt.* 180
2. Where a bond is given by principal and surety, and at the same time a mortgage is made for se-

curing the debt, the surety, if he pays the bond, has a right to stand in place of the mortgagee. *Copis* v. *Middleton*. Page 231

3. An officer in the army cannot pledge or mortgage his commission.

An officer deposited his commission as a security for a loan of money, and further covenanted with the depositary *B.* to sell the commission, and to repay the loan out of the proceeds of the sale; a sale having been effected subsequently, and the regulation price having been paid to the retiring officer's agents, he transmitted to them a written order, directing them to discharge, out of the money in their hands, certain specified debts due from him to certain specified individuals, which individuals had no notice of his contract with *B.*: Held, that these creditors were entitled to a priority over *B.*

After the institution of the suit, the officer took the benefit of the insolvent debtors' act: Held, that *B.* had not any title preferable to that of the general body of the insolvents' creditors, to the surplus which remained after the debts specified in the written order were satisfied. *Collyer* v. *Fallon*. 459

4. Where a decree ordered, that, in taking the accounts of a mortgagee in possession, annual rests should be made, and that the rents and profits of the premises, as often as they exceeded the interest accrued due on the debt should be applied in reduction of the principal; a rest ought to be made at the date of the receipt by the mortgagee of a sum exceeding the interest, though occurring in the interval between the annual rests.

From that date the subsequent annual rests ought to be computed.

An equity of redemption, being subject to a trust for sale, the mortgagee, with some of the *cestuisque trust* of the equity of redemption, filed a bill for the sale of the premises, alleging that the whole of his principal, with an arrear of interest, was due to him, and suppressing the fact, that he had been for several years in possession; the result of the account was, that nothing was due on the mortgage when the bill was filed: Held, that the mortgagee must pay to the defendants the costs of so much of the suit as related to the mortgage and the accounts and enquiries concerning it. *Binnington* v. *Harwood*. Page 477

See ESTATE, 1.

MORTMAIN.

A testator, after giving a legacy in trust for a charitable purpose, says, — "As money is of more uncertain value than land, I do also give them (the trustees) power to make such purchase as they shall think best for perpetuating the gift;" Held, that these words do not bring the legacy within the

mortmain act. *Attorney-General* v. *Goddard.* Page 348

NE EXEAT REGNO.

1. A writ of *ne exeat regno* against a feme covert administratrix cannot be sustained. *Pannell* v. *Tayler.* 96

Where a writ of *ne exeat regno* issues for a larger sum than is due, the Court will make an order that so much only shall be raised as is due, without quashing the writ.

Where the writ issues against an executor at the instance of a legatee, it must be marked for the whole amount of what is due, not only to the plaintiff, but to other persons. *Pannell* v. *Tayler.* 100

2. The writ of *ne exeat regno* does not issue for alimony after a decree in the Ecclesiastical Court pending an appeal from that decree. *Street* v. *Street.* 322

The writ of *ne exeat regno* is not granted for interim alimony before a decree. *Street* v. *Street.* 323

3. In a suit against a purchaser for specific performance, where a receiver had been appointed, and was in possession of the estate, and the Master's report in favour of the title, except as to a very small part of the estate for which the purchaser was entitled to an abatement, had been confirmed, and followed by an order, by which, after referring it to the Master to ascertain what abatement the purchaser was entitled to, and to compute interest upon the remainder of the purchase-money, and to settle the conveyances, it was ordered, that upon the execution of the conveyances, and delivery thereof and of the title-deeds to the purchaser, he should pay to the plaintiffs the remainder of the purchase-money, after deducting the abatement, with the interest to be computed by the Master, and that the receiver should thereupon deliver up to him possession of the estate, the Court refused to discharge a writ of *ne exeat regno* issued against the purchaser, and marked for the full amount of the purchase-money, though the abatement (which it clearly appeared would be less than the interest) had not been ascertained by the Master, and no steps had been taken towards the execution of the conveyances.

The sheriff having taken the defendant under the writ, refused to release him out of custody until the whole sum for which the writ was marked was paid into his hands, and the Court did not disapprove of his conduct. *Boehm* v. *Wood.* Page 332

Semble, Where the writ issues against the purchaser of an estate in a suit for specific performance, the circumstance that he may have property to answer the purchase-money is not to be regarded. 338

What the sheriff does in the case of a writ of *ne exeat regno* is upon his own responsibility. 340

Upon the defendant's stating that if the plaintiffs obtained a decree he would leave the kingdom, the writ was issued in an early stage of the cause. Page 342

The Master of the Rolls has jurisdiction to direct the writ to issue. 343

The debt for which the writ issues must be equitable—must be due—and must be such a debt that the sum to be marked upon the writ can be ascertained.

The case of account an exception to the rule that the debt must be equitable.

The exception founded on the difficulty of proceeding at law in such matters.

In matters of account the party may swear to his belief as to the amount of the balance.

The cases of the writ being issued in suits for specific performance are also founded on the difficulty of proceeding at law.

The rule that the sum to be marked upon the writ must be ascertained instanced in the case of executors.

Upon the application for the writ it need not be sworn that the party is going abroad for the purpose of avoiding payment of the debt. *Boehm* v. *Wood.* 344

NEXT OF KIN.

If a testator means to create a trust, and the trust be ineffectually created, or fails; the next of kin take. *Ommanney* v. *Butcher.* 270

See EXECUTOR, 1.
WILL, 8.

NOTICE.

Whether notice to an attorney in one transaction shall be notice to him in another transaction, must in all cases depend upon the circumstances. *Mountford* v. *Scott.* Page 280

OPENING BIDDINGS.

See PRACTICE, 3.

PARENT AND CHILD.

1. A father, tenant for life, remainder to his first and other sons successively in tail male; the eldest son, soon after he attained twenty-one, joined his father in suffering a recovery; an annuity was secured to him during his father's life; parts of the estates were limited to the father in fee, and the residue of them were resettled, the son taking back an estate for life, with remainder to his first and other sons in tail general, remainder to his daughters in tail general. The transaction is to be considered as a mixed case of bargain and sale, and of family arrangement; and the eldest son having died without issue, a bill filed by his brother, the next remainder-man in tail, who had done confirmatory acts, and accepted interests under the will of his father, to set aside the settlement as obtained by undue influence, was dismissed.

Transactions of this nature between father and child, to be viewed

with a reasonable degree of jealousy, not in the light of reversionary bargains.

Whether, after the lapse of twenty years, such a suit could be maintained at all? — *Quære.*

Whether a remote remainder-man can complain of a transaction between the tenant for life and the immediate remainder-man, where the immediate remainder-man makes no complaint? — *Quære.*
Tweddell v. *Tweddell.* Page 1

PARTIES.

1. A testatrix gives a legacy in trust for the minister of a chapel, but directs that, upon a specified contingency, the legacy is to go to the trustees of a certain college; the interest is paid during many years to the minister of the chapel: Held, that the charity for the chapel may be established upon a bill and information to which the trustees of the college are not parties. *Attorney-General* v. *Goddard.* 348

2. Where there is a case for a special injunction, and the injunction will operate for the benefit of parties not before the Court, the absence of those parties, though made the ground of demurrer to the bill, will not prevent the court from interposing. *Const* v. *Harris.* 512

3. Where an executor has not assented to a specific bequest, the persons beneficially entitled are not necessary parties to a suit relating to the property specifically bequeathed. *Const* v. *Harris.* Page 514

See RECEIVER, 2.

PARTNERSHIP.

1. A testator directs, that *W. F.* shall, with a capital taken out of his assets, continue his the testator's business; that he shall bind *D. G.* apprentice to himself; that he shall take *D. G.* into partnership at the end of his apprenticeship, or so soon after as he shall think him capable; and that *D. G.* shall have one third of the profits of the business: *D. G.* is not entitled to claim any share of the profits which are made before he is admitted into partnership. *Gordon* v. *Rutherford.* 375

2. The representative of a deceased partner, the account between him and the partnership being at the time unsettled, agrees with the surviving partners to assign to them all his interest in the concern, upon being paid a certain sum of money, and having an indemnity against all claims upon the partnership; the assignment is executed, the money paid, and a joint covenant of indemnity given by the surviving partners: Held, that the covenant is not to be considered in equity as a joint and several covenant. *Sumner* v. *Powell.* 423

3. The Court will entertain a bill to compel partners to act according to the provisions of instruments into which they have entered, and

where it will interfere for that purpose, will take care that the decree shall not be defeated by any thing done in the meantime:

Thus, where in 1812, the then proprietors of *Covent Garden* theatre executed a deed, by which they covenanted and agreed that the profits of the theatre should be exclusively appropriated to particular purposes, and that the treasurer for the time being should be irrevocably directed so to apply the profits; and in 1822, parties then entitled, under the former proprietors, to seven eighths of the theatre, entered into an agreement, which provided in some respects for a different application of the profits, and otherwise affected the rights of a party interested in the remaining eighth, who was not consulted on the subject, the Court, upon a bill filed by that party, for the specific performance of the covenants and agreements contained in the deed of 1812, appointed a receiver. *Const* v. *Harris*. Page 496

4. The Court will not appoint a receiver, or a manager, of any partnership concern, unless the suit be so framed, as that a decree may be made, either that the concern shall be carried on according to the terms of an instrument, which by the agreement of the parties was to regulate the mode of its being carried on, or that it shall be wholly put an end to. *Const* v. *Harris*. 517

5. Partners may be held by their conduct to have changed the terms of a written agreement into which they have entered for carrying on the concern. *Const* v. *Harris*. Page 523

6. The act of a majority of partners is the act of all, provided all are consulted, and the majority are acting *bond fide*. *Const* v. *Harris*. 525

7. The majority of partners never represents the whole body, except where there has been a voice called for from the minority.

The Court will generally take the opinion of the minority to have been fairly over-ruled. *Const* v. *Harris*. 527

PERPETUITY.

Devise to *A*. for ninety-nine years, if he should so long live; remainder to his first son, then unborn, for ninety-nine years, if he should so long live; and so on in tail male to such first son lawfully issuing for ever; and for want and in default of such issue of such first son, to the second and other sons successively for ninety-nine years only, in case he should so long live; and that such eldest son or the issue of such elder son should have no greater estate than for ninety-nine years, determinable at his decease; and if there should be no issue male of *A*., at the time of his (*A*.'s) death, or in case there should be such issue male at that time, and they should all die before twenty-one without issue male, then to *B*. for ninety-nine

years, if he should so long live; remainder to the first son of *B.* for ninety-nine years, if he should so long live, &c.: Held, that *A.* took under the will an estate for ninety-nine years in the freehold estates, determinable with his life, and the same estate in the leaseholds, if they should so long continue; and that, upon his death, his first son would take an estate for ninety-nine years in the freeholds, determinable with his life, and the remainder of the term in the leaseholds: but that the limitations to the second and other unborn sons of *A.* were void, as tending to perpetuity; and the limitations over to *B.*, &c. after these void limitations were not accelerated, but were void also. *Beard* v. *Westcott.* Page 25

See ACCUMULATION, 1.

PLEA.

After plea pleaded, and replication filed, and before the plea set down, it is not a motion of course to withdraw the replication, and amend the bill.

An order for that purpose, obtained of course, discharged for irregularity, and the amended bill ordered to be taken off the file. *Carleton* v. *L'Estrange.* 23

PLEADING.

1. Claiming the residue as executor is sufficient to let in parol evidence in support of the legal title, without alleging a title by the effect of the parol evidence. *Lynn* v. *Beaver.* Page 66

2. *Semble*, Two persons averring that the title is in one or the other of them, and each contending that it is in himself, cannot join in a suit as co-plaintiffs. *Cholmondeley* v. *Clinton.* 116

3. Some of the holders of scrip or shares of a loan cannot file a bill on behalf of themselves and the other holders to have their subscriptions returned.

Several persons having distinct demands, and not being able to sue on behalf of themselves and others, cannot be co-plaintiffs.

The cases in which a bill can be filed by one person on behalf of himself and others, are cases in which the others have a choice between that and nothing. *Jones* v. *Garcia del Rio.* 297

4. If, in the course of proceedings in a suit for specific performance, there comes out a fact, not put in issue in the cause by either party, which affects the legality of the contract, or tends to shew that the contract is not fully stated in the bill, the Court will direct an enquiry into the fact so disclosed. *Parker* v. *Whitby.* 366

POWER.

1. A power of sale and exchange vested in the trustees of a settlement, may be exercised by the trustees upon a sale to or an exchange with the tenant for life of the settled estates.

Where upon the exercise of

such a power it is declared that the estate shall be vested in the purchaser, the purchase being made in the name of a trustee, an appointment to the trustee, in trust for the purchaser, is a valid execution of the power. *Howard* v. *Ducane.* Page 81

2. A testator having a power of appointment over certain freehold and copyhold estates, and being seised of other freehold estates, devises all his freehold and copyhold estates, without reference to the power: Held an execution of the power as to the copyhold estates, but not as to the freehold estates which were subject to the power. *Lewis* v. *Lewellyn.* 104

3. A tenant for life, with a power of appointing the property by will to all or any of the testator's children, may release or extinguish the power. *Horner* v. *Swann.* 430

4. A testator bequeathed certain funds in trust for his wife, during her widowhood, and, after giving her a power to appoint them by deed or will, provided she did not marry again, directed, that, upon her second marriage, or her death without having exercised her power, they should sink into the general residue of his estate; the widow executed a deed, purporting to be an appointment of the property to the residuary legatees in the same proportions in which they would have been entitled to it under the residuary clause; and she and they concurred in assigning the funds upon trust for the residuary legatees: the Court refused to act upon the appointment and assignment during the widow's life. *Goldsmid* v. *Goldsmid.* Page 445

PRACTICE.

1. After plea pleaded, and replication filed, and before the plea set down, it is not a motion of course to withdraw the replication, and amend the bill.

An order for that purpose, obtained of course, discharged for irregularity, and the amended bill ordered to be taken off the file. *Carleton* v. *L'Estrange.* 23

2. Solicitor, who had become incapable of practising (without being re-admitted) in consequence of having neglected to obtain a certificate for one whole year, ordered to be re-admitted on payment of a small fine only, without the arrears of duty. *Ex parte Murray.* 56

3. The rules which regulate the practice of opening biddings upon a sale of landed estate, do not apply when a colliery is the subject of sale.

Upon an offer to give 10,000*l.* for a colliery, sold for 8850*l.* a motion to open the biddings was refused.

The rule is not universal that biddings shall not be opened in favour of parties present at the sale.

Residuary legatee, tenant for life, or reversioner, may become

the purchaser of an estate sold in the Master's office.

The person who opens the biddings is discharged, if he is outbid at the sale. *Williams* v. *Attenborough.* Page 77

4. Upon a motion for a reference of title, where the performance of the contract is resisted upon other grounds, the Court will look into the answer to see whether those other grounds are substantial or frivolous.

Where the subject of the contract was a life annuity, and the defendant insisted that time was of the essence of the contract, a motion for a reference to the Master upon the title was refused.

The nature of the property sold may make time of the essence of a contract. *Withy* v. *Cottle.* 79

5. A solicitor has no lien upon the will of his client, and cannot refuse to produce a deed executed by the client in his favour, containing a reservation of a life interest, and a power of revocation.

Where a deed is sought to be impeached, the plaintiff is entitled to have it produced, and the defendant cannot resist the production upon the ground of lien.

In a suit instituted against a solicitor, who had also acted in the capacity of steward, for an account and for delivery of title deeds, the Court upon motion ordered the deeds to be delivered up to the plaintiff, upon payment into Court of so much of the balance claimed by the answer as was not covered by any security. *Balch* v. *Symes.* Page 87

6. Where the plaintiff is misnamed in an order to dismiss a bill for want of prosecution, in consequence of an error in the six clerks' certificate, a replication filed after service of the order will not be irregular. *Semble.* *Verlander* v. *Codd.* 94

7. The Court, upon petition under the statute 56 *G.* 3. *c.* 60., will direct stock, which has been transferred to the sinking fund, to be re-transferred to the petitioners, where their title is clear, without any reference to the Master to ascertain who is beneficially entitled to the stock. *Ex parte Nicholl.* 119

8. The Court will not direct a reference to the Master, as to the reduction of rent, upon the petition of a tenant. *Ex parte Town.* 137

9. Motion to stay the execution of a writ of enquiry of damages, not supported by the ordinary affidavit upon a motion to stay trial, refused with costs. *Rodenhurst* v. *Tudman.* 305

10. If a bill and cross bill be filed, the plaintiff in the original bill has a right to the first answer, and may move to stay proceedings in the cross cause till the original bill is answered, though the plaintiff in the cross bill may be in a situation to enforce an answer first.

The right of the plaintiff in the original bill to make the motion,

was held not to have been waved by his having taken out the common orders for time to answer the cross bill. *Harris* v. *Harris*. Page 165

11. Where the enrolment of a decree is gained by surprize, the Court will vacate it. *Stevens* v. *Guppy*. 178

12. A defendant who has put in three insufficient answers, and is in custody for want of a fourth, is entitled to his discharge immediately on filing the fourth answer.

After a fourth answer reported insufficient, it is a motion of course, that the defendant shall be examined upon interrogatories and stand committed.

The interrogatories are to be settled by the Master, and must go directly to the points to which the exceptions are sustained.

The defendant, instead of putting in a written examination to the interrogatories, is to be examined personally upon them by the Master. *Farquharson* v. *Balfour*. 184

13. Where a defendant admits books in the *West Indies*, to be in his possession, custody, or power, the Court will order him to bring them here within a reasonable time, and if they are not brought, will consider it the same as if he had them here in the first instance, and refused to produce them. 190

14. Papers belonging to a defendant are in his possession, custody, or power, although they may be in the *West Indies*. 191

15. Exceptions to the Master's report of the insufficiency of a fourth answer, ordered to be heard immediately, upon the terms of the defendant's rendering himself amenable to process. Page 188

16. Where one of several plaintiffs dies before answer, a motion may be made by the defendant, that the surviving plaintiffs shall within a limited time revive the suit, or that the bill shall be dismissed with costs. *Adamson* v. *Hall*. 258

17. A solicitor's bill having been partly taxed, and paid, an order, obtained as of course, referring the bill generally for taxation, was discharged with costs.

Semble, An order directing the costs of the suit to be taxed warrants a taxation up to the time of the Master's making his report. *Clutton* v. *Pardon*. 301

18. Motion to stay the execution of a writ of enquiry of damages, not supported by the ordinary affidavit upon a motion to stay trial, refused with costs. *Rodenhurst* v. *Tudman*. 305

19. Where a plaintiff amended his bill after answer, but did not serve a subpœna to answer the amendment, or file a replication to the answer, an order obtained as of course to dismiss the bill for want of prosecution, after three terms from the filing of the answer, but within three terms from the date of the amendments, was held to be regular, though the defendant had obtained an order that the plaintiff should amend his bill

within a limited time, and the plaintiff had amended accordingly, and had also amended the defendant's office copy of the bill. *Cooke* v. *Davies.* Page 309

20. Where a cause was not proceeded in for three clear terms after answer, the common order to dismiss the bill for want of prosecution, obtained by the defendant in the vacation after the third term, was held to be regular. *Farquharson* v. *Seton.* 378

21. Upon a motion for a prohibition, a copy of the libel in the ecclesiastical court verified by affidavit and a suggestion on parchment setting forth the libel and the ground of the prohibition prayed must be delivered into court, and if the prohibition is granted, affidavits of the truth of the facts suggested must be filed within six months. *In re Magor.* 314

22. After a plea over-ruled, an order for time to answer, obtaining as of course, is irregular. *Ferrand* v. *Pelham.* 404

23. A party who is served with a petition, but who has no interest in the order to be made upon it, is not entitled to the costs of appearing on the hearing of that petition. *Garey* v. *Whittingham.* 405

24. *Semble*, an order obtained as of course for the taxation of a bill of costs, which has been settled and paid, will not be discharged for mere irregularity, without any discussion of the merits, if the petition seeking to discharge that order enters into the merits of the case. *Gretton* v. *Leyburne.* 407

25. Where a receiver is appointed, and the person in possession refuses to attorn or to deliver up possession, it not appearing in what right the possession is held, the proper course is to move that the person may attorn.

It is not necessary, in the first instance, to make such person a party to the suit. *Reid* v. *Middleton.* Page 455

26. Where a bill is filed to stay waste, and a demurrer is put in, the Court will hear the demurrer immediately. *Const* v. *Harris.* 514

PRESCRIPTION.

1. There may be a prescription *in non decimando* for a district; or even for a hundred.

Where a prescription *in non decimando* is set up, the party must show the specific ground upon which he claims to prescribe. *Chichester* v. *Sheldon.* 250

2. Strong evidence required in support of a prescription *in non decimando.* 251

PRESUMPTION.

Where personal access between husband and wife is established, sexual intercourse is to be presumed; and the presumption must stand till rebutted by clear and satisfactory evidence. *Head* v. *Head.* 138

PRINCIPAL.

See SURETY.

PRIORITY.

1. An officer deposited his commission as a security for a loan of money, and further covenanted with the depositary *B.* to sell the commission, and to repay the loan out of the proceeds of the sale; a sale having been effected subsequently, and the regulation price having been paid to the retiring officer's agents, he transmitted to them a written order, directing them to discharge, out of the money in their hands, certain debts due from him to certain specified individuals, which individuals had no notice of his contract with *B.*: Held, that these creditors were entitled to a priority over *B.*

After the institution of the suit, the officer took the benefit of the insolvent debtor's act: Held, that *B.* had not any title, preferable to that of the general body of the insolvent's creditors, to the surplus which remained after the debts specified in the written order were satisfied. *Collyer* v. *Fallon.* Page 459

PRODUCTION OF DOCUMENTS.

See PRACTICE, 5.

PROHIBITION.

Upon a motion for a prohibition a copy of the libel in the ecclesiastical court verified by affidavit and a suggestion on parchment setting forth the libel and the ground of the prohibition prayed, must be delivered into court, and if the prohibition is granted, affidavits of the truth of the facts suggested must be filed within six months. *In re Magor.* Page 314

RECEIVER.

1. Where a receiver is appointed in a suit for specific performance, if the purchaser is compelled to take the title, the receiver is to be considered as his receiver. *Boehm* v. *Wood.* 345
2. Where a receiver is appointed, and the person in possession refuses to attorn, or to deliver up possession, it not appearing in what right the possession is held, the proper course is to move that the person may attorn. It is not necessary, in the first instance, to make such person a party to the suit. *Reid* v. *Middleton.* 455
3. The Court will not appoint a receiver, or a manager, of any partnership concern, unless the suit be so framed, as that a decree may be made, either that the concern shall be carried on according to the terms of an instrument, which by the agreement of the parties was to regulate the mode of its being carried on, or that it shall be wholly put an end to. *Const* v. *Harris.* 517

See PARTNERSHIP, 3, 4.

RECOVERY.

Equitable tenant in tail aliens in fee by way of mortgage; a good

equitable recovery may be suffered of the secondary equitable estate without the concurrence of the mortgagee. *Nouaille* v. *Greenwood.* Page 26

RELATIONS.

The word "relations" means persons entitled according to the statute of distributions, and is a term that sufficiently describes a class of persons. *Wright* v. *Atkyns.* 161

REMAINDER-MAN.

See ESTATE, 4.
FAMILY ARRANGEMENT.

REMOTENESS.

See PERPETUITY, 1.

RENEWAL.

1. The jurisdiction to give effect to an award, confirmed by the decree of the Court in the case of a charity, is doubtful: but the renewal of a lease upon the terms of the award, having been twice directed by the Court, was again enforced. *Attorney-General* v. *Clements.* 58

REPLICATION.

See PRACTICE, 1.

RESIDUE.

See CHILDREN, 1.
LAPSE, 1.
TENANT FOR LIFE, 1, 2.
WILL, 8, 9.

RESTS.

See ACCOUNT.

REVERSIONARY BARGAINS.

See FAMILY ARRANGEMENT, 1.

REVERSIONARY INTEREST.

The Court refused to take the consent of a married woman to give up her reversionary interest, in part vested and in part contingent, in a fund in Court, in favour of a purchaser from her husband. *Wade* v. *Saunders.* Page 306

REVIVOR.

Where one of several plaintiffs dies before answer, a motion may be made by the defendant, that the surviving plaintiffs shall within a limited time revive the suit, or that the bill shall be dismissed with costs. *Adamson* v. *Hall.* 258

SCHEDULE.

See IMPERTINENCE, 1.

SOLICITOR.

1. Solicitor, who had become incapable of practising (without being re-admitted) in consequence of having neglected to obtain a certificate for one whole year, ordered to be re-admitted on payment of a small fine only, without the arrears of duty. *Ex parte Murray.* 56
2. A solicitor has no lien upon the will of his client, and cannot refuse to produce a deed executed by the client in his favour, containing

a reservation of a life interest, and a power of revocation.

In a suit instituted against a solicitor, who had also acted in the capacity of steward, for an account and for delivery of title deeds, the Court upon motion ordered the deeds to be delivered up to the plaintiff, upon payment into Court of so much of the balance claimed by the answer as was not covered by any security. *Balch* v. *Symes.* Page 87

3. Where a client executes a deed in favour of a solicitor, reserving a life interest and a power of revocation, it is the duty of the solicitor to leave a counterpart of the deed in the hands of the client. 92

4. Where a party has a pressing necessity for papers in the hands of his solicitor, the Court will order them to be delivered up upon a deposit being made sufficient to cover the amount of the solicitor's bill and the costs of the taxation. *Clutton* v. *Pardon.* 304

5. A solicitor cannot obtain the taxation of his agent's bill without bringing the amount into Court. *Ostle* v. *Christian.* 324

6. A solicitor who has declined to proceed with a cause will be ordered, though his bill of costs are not paid, to deliver up the papers to the present solicitor of the party, the latter undertaking to hold them subject to the former solicitor's lien, for what shall be found due to him on the taxation of the bills.

An offer on the part of the former solicitor, after the motion is made, to proceed with the cause, will not prevent the Court from ordering him to deliver up the paperson the terms mentioned above. *Colgrave* v. *Manley.* Page 400

See COSTS, 2.

SPECIFIC PERFORMANCE.

1. The author of a voluntary settlement cannot file a bill for the specific performance of a contract afterwards entered into by him to sell the settled estate.

Whether his creditors after his death can maintain a bill. *Quære.*

The court was of opinion, that limitations in a marriage settlement to the brothers of the settlor and their issue were voluntary; but thought, under the circumstances, that a purchaser could not be compelled to take the title depending on the validity of those limitations, and dismissed a bill by the creditors of the vendor after his death for specific performance, there having been subsequent dealings with the estate which might have confirmed the settlement, the agreement for purchase being suspicious, and it being doubtful whether the creditors could file such a bill. *Johnson* v. *Legard.* 281

2. In a suit against a purchaser for specific performance, where a receiver had been appointed and was in possession of the estate, and the Master's report in favour

of the title, except as to a very small part of the estate for which the purchaser was entitled to an abatement, had been confirmed and followed by an order, by which, after referring it to the Master to ascertain what abatement the purchaser was entitled to, and to compute interest upon the remainder of the purchase-money, and to settle the conveyances, it was ordered, that upon the execution of the conveyances and delivery thereof and of the title-deeds to the purchaser, he should pay to the plaintiffs the remainder of the purchase-money, after deducting the abatement, with the interest to be computed by the Master, and that the Receiver should thereupon deliver up to him possession of the estate, the Court refused to discharge a writ of *Ne exeat regno* issued against the purchaser, and marked for the full amount of the purchase-money, though the abatement, (which it clearly appeared would be less than the interest) had not been ascertained by the Master, and no steps had been taken towards the execution of the conveyances. *Boehm* v. *Wood*. Page 332

3. Where a receiver is appointed in a suit for specific performance, if the purchaser is compelled to take the title, the receiver is to be considered as his receiver. *Boehm* v. *Wood*. 345

4. The person entitled to the reversion in fee of a house, expectant upon a term vested in a lessee who has demised the premises for a portion of his term to a sub-lessee, agrees by one letter to grant that sub-lessee, *an extension of lease* at a certain yearly rent, and, in another letter, fixes the time, when the term which he thus proposes to grant, is to expire; this is a valid agreement within the statute of frauds, and, under it, the sub-lessee, has a right to a lease which shall commence from the expiration of the existing term. *Verlander* v. *Codd*. Page 352

5. Specific performance will not be decreed of an agreement to sell certain property at a price to be settled by two persons who are named, if the Court sees reason to believe, that the price, subsequently fixed by these persons, is considerably below the real value of the property. *Parken* v. *Whitby*. 366

6. Where in a suit by a vendor for specific performance, the Master reported in favour of the title, but the Court, on an exception taken by the purchaser, deemed the title doubtful, an order was made dismissing the bill without costs, but neither allowing nor disallowing the exception. *Willcox* v. *Bellaers*. 491

7. Devise of several estates to *A*. for life, with remainder to trustees to preserve contingent remainders, with remainder to the first and other sons of *A*. in tail male, with divers remainders over, with power to the persons from time to time

entitled to the estates devised to lease all such estates, except an estate called *Juts*, and with a direction that the persons who should be entitled to and possessed of the devised estates, should not lease the estate called *Juts*, or any part thereof; and that every such person should live and reside on the said estate called *Juts*, and for default thereof all the devised estates to go over to the person next in succession, as if the person refusing or neglecting to reside or live at *Juts* was actually dead.

Held, in a suit by parties making title under a recovery suffered by *A.* and his eldest son against a purchaser, for specific performance, that it was too uncertain what the testator meant by the words "live and reside" for the Court to determine that there had been a forfeiture; and a specific performance decreed. *Fillingham* v. *Bromley*. Page 530

STATUTES.

2 & 3 Edw. 6. c. 13. 315
9 & 10 Will. 3. c. 15. 121
36 Geo. 3. c. 90. 330
56 Geo. 3. c. 60. 119

See FRAUDS (Statute of).
LIMITATIONS (Statute of).

SURETY.

1. Where two persons execute a bond, the one as principal, the other as surety, and no other assurance is executed at the time, the surety paying the bond debt is only a simple contract creditor of the principal. *Copis* v. *Middleton*. Page 224

2. It is a general rule that in equity a surety is entitled to the benefit of all the securities which the creditor has against the principal; the rule, however, must be qualified, by considering it to apply to such securities as continue to exist, and do not get back upon payment to the person of the principal debtor. 229

3. Where a bond is given by principal and surety, and at the same time a mortgage is made for securing the debt, the surety, if he pays the bond, has a right to stand place of the mortgagee. 231

4. *A.* and *B.* entered into a joint and several bond for securing a sum of money advanced to *A.* by his bankers. After the execution of the bond, and before it became due, *A.* paid money to the bankers, and he continued to draw upon them until his banking account was overdrawn. Some years afterwards an account was settled between *A.* and the bankers, in which the whole money secured by the bond was treated as remaining due from *A.* The bankers then took a warrant of attorney from *A.* for securing payment of the balance found due upon the settlement by instalments at distant periods. Several of the instalments were paid, but *A.* became bankrupt before the whole debt was liquidated. It being

proved that *B.* was privy to the settlement of accounts between *A.* and the bankers, and to the arrangement respecting the warrant of attorney: Held, first that *B.* was not discharged by the time given to *A.*, and secondly, that the bond was not discharged by the course of payment, the money paid by *A.* to the bankers being applicable to the banking account, and the bankers being entitled to hold the bond and warrant of attorney as distinct securities.

Upon the occasion of the bond being executed the title deeds of an estate purchased by *A.* were deposited with *B.* as an indemnity against his liability upon the bond; the legal interest in the estate was likewise conveyed to *B.*, and it was agreed that he should also hold it as an indemnity. After the death of *B.* his executor delivered up the title deeds to *A.*, upon a false representation by him that the bond had been paid off: Held, that a conveyance of the legal estate could not be compelled until the indemnity was worked out, and that the lien upon the title deeds remained. *Tyson* v. *Cox.* Page 395

5. Where sureties are bound by different instruments for equal portions of a debt due from the same principal, and the suretyship of each is a separate and distinct transaction, there is no right of contribution between them. *Coope* v. *Twynam.* 426

TAXATION.

1. Where a party has a pressing necessity for papers in the hands of his solicitor, the Court will order them to be delivered up upon a deposit being made sufficient to cover the amount of the solicitor's bill and the costs of the taxation. *Clutton* v. *Pardon.* Page 304
2. A solicitor cannot obtain the taxation of his agent's bill without bringing the amount into Court. *Ostle* v. *Christian.* 324
3. A bill of costs, where the amount of it has been settled between the solicitor and client, and part of it has been paid and security given for the remainder, will not be ordered to be taxed, merely because it contains charges which would be disallowed on taxation.

Semble, an order obtained as of course, for the taxation of a bill of costs, which has been settled and paid, will not be discharged for mere irregularity, without any discussion of the merits, if the petition, seeking to discharge that order, enters into the merits of the case. *Gretton* v. *Leyburne.* 407

TENANT FOR LIFE.

1. Testator, having devised lands to *A.* for life, remainder to his children in strict settlement, directs the residue of his personal estate, subject to the payment of debts and legacies, with all convenient speed to be laid out in the purchase of lands, to be settled forthwith to the same uses, with a proviso, that the trust-monies,

until they should be laid out, might be invested upon government or real securities, the dividends and interest of which were to go and be paid as the rents of the lands to be purchased would go and be payable; a large portion of the testator's personal estate, not required for the payment of debts and legacies, being invested in the funds, and upon securities carrying interest, the tenant for life was held entitled to the interest of that portion from the death of the testator. *Angerstein* v. *Martin*. Page 232

2. Testator directs his executors to invest the residue of his estate, after payment of debts and legacies, in the funds or upon securities, the interest to be paid to *A.* for life, and after his death, the principal to be held upon trusts for his children; the tenant for life was held to be entitled to interest, accruing within the year next after the testator's decease, upon funds on which the testator's property stood invested at the time of his death, and which were not required for the payment of debts and legacies. *Hewitt* v. *Morris*. 241

3. A tenant for life, with a power of appointing the property by will to all or any of the testator's children, may release or extinguish the power. *Horner* v. *Swann*. 430

See ESTATE, 4.

TIMBER.

See INJUNCTION, 2.

TIME (LENGTH OF).

1. Where there has been adverse possession, not accounted for by some disability, as coverture or infancy for twenty years, a court of equity ought not to interfere. *Cholmondeley* v. *Clinton*. Page 108

2. An estate being in lease, *A.* enters and receives the rents during the continuance of the lease, and afterwards continues in possession up to a period more than twenty years distant from the time of his entry. Within twenty years after the expiration of the lease, *B.* brings an ejectment, and files a bill for discovery; though the ejectment might be maintained at law, a demurrer to the discovery is good. *Cholmondeley* v. *Clinton*. 107

See FAMILY ARRANGEMENT, 1.

TITHES.

1. Wood springing from the roots or stools of trees is titheable, and neither its own age, nor the age of the trees from the roots or stools of which it sprung, will exempt it. *Chichester* v. *Sheldon*. 245

2. There may be a prescription *in non decimando* for a district; or even for a hundred.

Where a prescription *in non decimando* is set up, the party must shew the specific ground upon which he claims to prescribe. 250

TRUST.

1. To create a trust by means of an obligation imposed upon the con-

science of a devisee, the words must be imperative, the subject must be certain, and the object as certain as the subject.

The words "in the fullest confidence" are imperative. *Wright* v. *Atkyns*. Page 157

2. A sum of money was paid by *A.* to *B.*, for the purpose of purchasing *C.* promotion in the army, and it remained unapplied in the hands of *B.* at the death of *A.*, *C.*, having been compelled from the bad state of his health to quit the army, and having no prospect of being able to enter into the service again, filed a bill for the money, and it was decreed to be paid to him. *Leche* v. *Lord Kilmorey*. 207

3. A trust to be carried into execution by the Court, must be of such a nature that it can be under the control of the Court. *Ommanney* v. *Butcher*. 270

TRUSTEE.

A trustee who is in a state of mind which renders him incompetent to the management of business, may refuse to transfer within the meaning of the 36 *G.* 3. c. 90. s. 1. *West* v. *Ayles*. 330

See EXECUTOR, 1.

VENDOR AND PURCHASER.

1. The rules which regulate the practice of opening biddings upon a sale of landed estate, do not apply when a colliery is the subject of sale.

Upon an offer to give 10,000*l.* for a colliery, sold for 8850*l.*, a motion to open the biddings was refused. *Williams* v. *Attenborough*. Page 70

2. The rule is not universal that biddings shall not be opened in favour of parties present at the sale.

Residuary legatee, tenant for life, or reversioner, may become the purchaser of an estate sold in the Master's office. 76

See CONVERSION, 1.

SPECIFIC PERFORMANCE.

VOLUNTARY SETTLEMENT.

1. The author of a voluntary settlement cannot file a bill for the specific performance of a contract afterwards entered into by him to sell the settled estate.

Whether his creditors after his death can maintain such a bill. *Quære.*

The court was of opinion, that limitations in a marriage settlement to the brothers of the settlor and their issue were voluntary; but thought, under the circumstances, that a purchaser could not be compelled to take the title depending on the validity of those limitations, and dismissed a bill by the creditors of the vendor after his death for specific performance, there having been subsequent dealings with the estate which might have confirmed the settlement, the agreement for purchase being suspicious, and it being doubtful whether the creditors

could file such a bill. *Johnson* v. *Legard*. Page 281

2. A voluntary settlement may be made good by matter *ex post facto*. 294

VOLUNTARY TRUST.

See TRUST, 2.

WILL.

1. Devise to *A.* for ninety-nine years, if he should so long live; remainder to his first son, then unborn, for ninety-nine years, if he should so long live; and so on in tail male to such first son lawfully issuing for ever; and for want and in default of such issue of such first son, to the second and other sons successively for ninety-nine years only, in case he should so long live; and that such eldest son or the issue of such elder son should have no greater estate than for ninety-nine years, determinable at his decease; and if there should be no issue male of *A.*, at the time of his (*A.*'s) death, or in case there should be such issue male at that time, and they should all die before twenty-one without issue male, then to *B.* for ninety-nine years, if he should so long live, remainder to the first son of *B.* for ninety-nine years, if he should so long live, &c.: Held, that *A.* took under the will an estate for ninety-nine years in the freehold estates, determinable with his life, and the same estate in the leasehold, if they should so long continue; and that, upon his death his first son would take an estate for ninety-nine years in the freehold, determinable with his life, and the remainder of the term in the leaseholds: but that the limitations to the second and other unborn sons of *A.* were void, as tending to perpetuity; and the limitations over to *B.*, &c. after these void limitations were not accelerated, but were void also. *Beard* v. *Westcott*. Page 25

2. Executor taking a contingent reversionary interest under the will, not precluded from giving evidence of the intention that he should have the residue beneficially, nothing upon the face of the will indicating that he was to take the office merely.

Under the effect of the will and the evidence, the executor was declared to be entitled beneficially.

Whether the contingent reversionary interest would have had the effect of rendering him a trustee for the next of kin. *Quære*. *Lynn* v. *Beaver*. 63

The motives which might influence the testator in favour of the executor are to be considered in determining the question, whether the executor takes the residue beneficially. 68

Bequest in terms importing an intention not to make an immediate disposition, may upon the construction of the whole will

amount to a present bequest. *Lynn* v. *Beaver.* Page 67

3. A testator having a power of appointment over certain freehold and copyhold estates, and being seised of other freehold estates, devises all his freehold and copyhold estates, without reference to the power: Held, an execution of the power as to the copyhold estates, but not as to the freehold estates which were subject to the power. *Lewis* v. *Lewellyn.* 104

4. Devise to *A.* and her heirs for ever, in the fullest confidence that after her decease she will devise the property to the testator's family; *A.* is tenant in fee. *Wright* v. *Atkyns.* 143

Under an immediate devise to *A.* for life, remainder to "my family," the heir at law of the testator is entitled in remainder. *Wright* v. *Atkyns.* 156

5. A legacy given to a married woman "for her own use and at her own disposal" vests in her as separate estate. *Prichard* v. *Ames.* 222

6. Testator, having devised lands to *A.* for life, remainder to his children in strict settlement, directs the residue of his personal estate, subject to the payment of debts and legacies, with all convenient speed to be laid out in the purchase of lands, to be settled forthwith to the same uses, with a proviso, that the trust monies, until they should be laid out, might be invested upon government or real securities, the dividends and interest of which were to go and be paid as the rents of the lands to be purchased would go and be payable; a large portion of the testator's personal estate, not required for the payment of debts and legacies, being invested in the funds, and upon securities carrying interest, the tenant for life was held entitled to the interest of that portion from the death of the testator. *Angerstein* v. *Martin.* Page 232

7. Testator directs his executors to invest the residue of his estate, after payment of debts and legacies, in the funds or upon securities, the interest to be paid to *A.* for life, and after his death the principal to be held upon trusts for his children; the tenant for life was held to be entitled to interest, accruing within the year next after the testator's decease, upon funds on which the testator's property stood invested at the time of his death, and which were not required for the payment of debts and legacies. *Hewitt* v. *Morris.* 241

8. Testator, after bequeathing to *A.* and *B.* legacies of stock unequal in amount, and giving several legacies to public charities, requests the said *A.* and *B.* to be his executors, and gives to them as such 100 guineas each. He then orders his books, jewels, plate, and household furniture to be sold; and after desiring mourning to be provided for his servants, and five guineas each to be given to several persons named in the will and to

his two executors for a ring as a token of remembrance, concludes his will in the following manner:— "In case there is any money remaining, I should wish it to be given in private charity." Held, That the general residue of the testator's personal estate, consisting of a leasehold estate, money in the funds, and a balance in cash, was not comprehended in the residuary clause, which was confined to the residue of the produce of the articles which the testator directed to be sold:

That private charity was an object too indefinite to give the crown jurisdiction, or to enable the Court to execute the trust:

That the executors having, as executors, equal legacies, could not take beneficially, and that the next of kin were therefore entitled to the general residue of the testator's personal estate, including what was comprehended in the residuary clause. *Ommanney* v. *Butcher*. Paige 260

9. Testatrix, by her will, disposes of certain long annuities, and of a sum in cash, and then uses the following words:—"I believe there will be sufficient money left to pay my funeral expenses."

By a codicil to her will the testatrix expresses herself thus:—"If there is money left unemployed, I desire it may be given in charity."

Held, that the general residue of the testatrix's personal estate, including a sum of 2500*l*. trust monies, in which she had a vested reversionary interest, at the time of her death, subject to be divested by the appointment of her mother, passed under the words "money left unemployed," and was well given to charity. *Legge* v. *Asgill*. Page 265, 266

10. Where real estates are devised in trust for the payment of debts, in aid of the personal estate, the statute of limitation does not run in equity after the death of the testator. *Hughes* v. *Wynne*. 307

11. Illegitimate children not entitled under the description of children, the intention not being sufficiently apparent upon the face of the will.

Legacy in trust for the children of *A*. to be equally divided between them, with benefit of survivorship, and a provision for maintenance out of the interest, *A*. having no children at the death of the testator: Held, that after-born children would take, and that the interest till the birth of a child fell into the residue. *Harris* v. *Lloyd*. 310

12. A testator gives a sum of stock to trustees, which they are to stand possessed of upon trust for *D. G.*, until he shall attain the age of twenty-five years, and are to transfer to him when they in their discretion shall think proper; he likewise directs, that, if *D. G.* dies without lawful issue before receiving the bequest, the stock shall sink into the residue of his the testator's estate; and he be-

queaths the residue to *W. F.*: while *D. G.* is under twenty-five years of age, and has not had the stock transferred to him neither he nor *W. F.* is entitled to receive the accruing dividends; but these dividends must accumulate, to accompany the capital in its final destination. *Gordon* v. *Rutherford.* Page 373

13. A testator directs, that *W. F.* shall, with a capital taken out of his assets, continue his the testator's business; that he shall bind *D. G.* apprentice to himself; that he shall take *D. G.* into partnership at the end of his apprenticeship, or so soon after as he shall think him capable; and that *D.G.* shall have one third of the profits of the business: *D.G.* is not entitled to claim any share of the profits which are made before he is admitted into partnership. *Gordon* v. *Rutherford.* 375

14. A testator bequeaths the residue of his property to his nephews and nieces on their respectively attaining twenty-five, with a direction that his trustees shall, in the mean time, apply the profits to their maintenance; but in case of the death of any of them unmarried and without issue, he gives the shares of those so dying unto the survivors equally, to be paid at the same time with their original shares; first a nephew and then a niece die, under twenty-five, unmarried and without issue; the whole residue is divisible among the survivors who attain the specified age, and the niece does not, upon the death of the nephew, acquire, under the clause of survivorship, a vested interest in her proportional part of his share. *Barker* v. *Lea.* Page 413

15. A testator, having first directed all his debts to be paid, bequeaths all his copyhold estates, and all his property whatsoever to his wife during her life, and after her decease to his surviving children, and appoints *A.* and *B.* his executors: The debts are charged on the copyhold estate. *Ronalds* v. *Feltham.* 418

16. A testator directs his executors and trustees to pay certain annuities and legacies, "clear of the property-tax, and all expenses attending the same;" the legacy-duty ought to be paid by the executors out of the assets of the testator, and the annuitants and legatees are entitled to receive the full amount of their respective legacies and annuities, without any deductions in respect of legacy-duty. *Courtoy* v. *Vincent.* 433

17. A testator directs that his executors pay to *A. B.* a yearly sum as wages, so long as she should continue in his wife's service, and if she continued in such service, that the payment should be made to her quarterly, free from all deductions, to cease in case she should leave the service of his wife, until the decease of his wife. The testator's wife died in his life-time. Held, that *A. B.* was entitled to the annuity during

her life. *Burchett* v. *Woolward.* Page 442

18. Construction of words of a devise as to giving an estate tail. *Willcox* v. *Bellaers.* 491

See EXECUTOR, 1.

WOOD.

See TITHES, 1.

WORDS.

See DESCENDANTS.

RELATIONS.

YORK, CUSTOM OF.

Where a testator, resident and domiciled at the time of his death within the province of *York*, disposes of all the residue of his personal estate, and names executors, but his disposition fails as to part of the residue, by the death of one of the residuary legatees in his life-time, the share which thus becomes lapsed will be apportioned between the widow and the next of kin, according to the statute of distributions, and will not be affected by the custom of the province. *Wilkinson* v. *Atkinson.* Page 255

END OF THE FIRST VOLUME.

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